1968

Deseret Architects and Engineers and Northwestern National Insurance Company v. The Industrial Commission of Utah, Murrel Hockenbury, Jr., Terminex, Inc., and The State Insurance Fund : Brief of Plaintiffs

Utah Supreme Court

N THE SUPREME COURT
F THE STATE OF UTAH

SERET ARCHITECTS AND
NGINEERS and NORTHWEST-
ERN NATIONAL INSURANCE
OMPANY,

Plaintiffs,

— vs. —

E INDUSTRIAL COMMIS-
ION OF UTAH, MURREL
OCKENBURY, JR., TERMI-
EX, INC., and THE STATE
NSURANCE FUND,

Defendants.

BRIEF OF PLAIN

APPEAL FROM THE DECISION
INDUSTRIAL COMMISSION OF

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IN THE SUPREME COURT OF THE STATE OF UTAH

DESERET ARCHITECTS AND ENGINEERS and NORTHWESTERN NATIONAL INSURANCE COMPANY,

Plaintiffs,

— vs. —

THE INDUSTRIAL COMMISSION OF UTAH, MURREL HOCKENBURY, JR., TERMINEX, INC., and THE STATE INSURANCE FUND,

Defendants.

Case No. 11139

BRIEF OF PLAINTIFFS

NATURE OF THE CASE

This is a review of proceedings before the Industrial Commission of Utah culminating in an order by the Commission requiring that plaintiffs pay defendant Murrel Hockenbury, Jr., compensation for injuries sustained by him at a time when he was on the payroll of defendant Terminex, Inc.

STATEMENTS OF FACTS

Murrel Hockenbury, Jr. (herein called the "Applicant") has been employed for many years by defendant Terminex, Inc. Terminex, Inc., is a corporation owned by George S. Nelson and Associates, herein sometimes referred to as "Nelson." At page 47 of the Record, Applicant testified that Nelson was "the owner" of Terminex, and counsel stipulated that "George S. Nelson & Associates, *besides doing business as Terminex of Utah*, carry on a consulting engineering business" (Record 108).

On January 16, 1967, the Applicant suffered the injury which is the basis of the instant claim while engaged in the collection of data for a fall-out shelter survey. (Record 3) He was doing this work pursuant to a contract between Nelson and Deseret Architects and Engineers, herein called "plaintiff." (Record 70) Nelson is a consulting engineer whose business includes the conduct of surveys. (Record 108) Applicant reported his injury to Nelson (Record 46) and Nelson dutifully filed its first report of injury as the "employer." (Record 3) The business of Terminex is pest extermination. To estimate the volume of gas necessary for pest extermination in a building, one must develop much the same information about the building as applicant was collecting for the fall-out shelter survey (see Data Collection Forms at Record 81). From time to time since 1962 Applicant and fellow Terminex employees have been diverted to fall-out shelter survey work by Nelson. (Record 48) They have always been carried on the Terminex

payroll while engaged in the survey work even though "surveys" are more in the category of work done by Nelson as a consulting engineer and less in the category of work done by Nelson as a pest exterminator.

In about October of 1966, plaintiff called Nelson and contracted for services in much the same manner as any customer contracts for engineering services. The details of the agreement under which Nelson provided the services were:

1. The personnel engaged in the survey were carried on the Nelson, i.e. Terminex, payroll.
2. Nelson assumed all "costs" involved in the employment relationship. Nelson, therefore, paid social security contributions, paid employment security taxes and accounted for applicant's withheld taxes. Moreover, compensation insurance premium was paid by Nelson (the owner of Terminex) on Applicant's wages paid during 1966 (the last accounting period for which data is available) including the months he was engaged in the fall-out survey work (Record 110); there appears to have been no question, at that time, about which employing entity had the obligation to provide compensation coverage.
3. Nelson had the right to recall Applicant from the survey at any time (Record 70).
4. Nelson received from plaintiff for the services Nelson was providing the amount of the wages paid the personnel engaged in the survey project plus 20% (Record 70).

Applicant performed the work of the survey without supervision. The applicant's testimony (Record 42) is

that he spent a day in plaintiff's office learning how to prepare the forms specified by the U. S. Department of Defense, Office of Civil Defense (Record 81). Thereafter, he conducted the survey without supervision although plaintiff did communicate to him the descriptions of the areas to be encompassed by the survey. (Record 50, 53) In this regard, the instruction given by plaintiff to applicant was no different in kind from the instruction given by any client of a civil engineering firm who wants land surveyed.

It is significant, we believe, that Nelson had been, on the previous occasions when applicant had done fallout shelter survey work, one of the agencies contracting directly with the Civil Defense Office to conduct the survey (Record 72). On those previous occasions, applicant was clearly working for Nelson. The only difference between the 1966 situation on the one hand and the 1962, 1964 situations on the other hand is that Nelson was receiving his profit as a contractor with the Civil Defense Office on the earlier occasions and as a contractor with plaintiff on the latest occasion. There can be no question that the 20% of applicant's wages paid to Nelson covered more than employer's taxes and contributions based on payroll. That 20% covered compensation insurance premiums and a generous contribution for Nelson's overhead, i.e. the costs of maintaining plant and supervisory staff.

DISPOSITION BELOW

The Commission found that applicant was an employee of plaintiff at the time of his injury and entitled to compensation from plaintiff rather than from Nelson or Terminex, Inc.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek an order of this court declaring the finding and conclusion of defendant Commission that applicant was an employee of plaintiff to be against the evidence and the law and remanding the cause for award against applicant's actual employer.

ARGUMENT

POINT I

THE COMMISSION FOUND AN EMPLOYMENT RELATIONSHIP TO EXIST BETWEEN PLAINTIFF AND APPLICANT IN THE ABSENCE OF ANY EXPRESS OR IMPLIED CONTRACT OF EMPLOYMENT.

There is no question whatsoever about applicant's having entered into an employment relationship with defendant Terminex, Inc., at some time before 1962. The contract was formal and unambiguous. Terminex, Inc. (George S. Nelson and Associates) recognized the relationship by all the formal payroll accounting procedures required by law. Applicant recognized the employment relationship by following Nelson's instructions and doing the work Nelson, as the "owner" of Terminex, instructed him to do. On at least two occasions, Nelson instructed

applicant to do fall-out shelter surveys when Nelson had contracted with the Civil Defense Office for that work. It was a kind of work well within the scope of Nelson's professional activity and a kind of work applicant had been trained to perform as a Nelson employee.

When, in 1966, applicant began doing fall-out shelter surveys, there was no rupture of the employment relationship both he and Nelson recognized. Applicant was directed by Nelson (Record 28) to report to plaintiff's office, get instructions about where to conduct surveys and how to record the data, and proceed with that work unless and until he received other instructions from Nelson who, under his contract with plaintiff (Record 70) retained the right to pull applicant off survey work at any time. Applicant was continuing to do work he had been trained to perform as a Nelson employee; he would continue to receive his checks from Nelson and he would hold himself ready to return to pest control employment at Nelson's command. Applicant's name continued to appear on the Terminex payroll; employment security and social security contributions, payments required by law to be made by "employers", were made by Terminex. In short, Terminex marked itself as applicant's employer by all the indicia which inhere in modern accounting procedures.

On the other hand, there was never any communication between plaintiff and applicant which either could have interpreted as a contract negotiation. It is true that applicant began performing a service with reference to which he had to get general instruction from plaintiff.

but the only *contract* negotiated was the one between plaintiff and Nelson. That contract, as both parties to it testified (Record 58, 70) provided that Nelson would retain the ultimate right to control applicant and assume all the employer obligations of the employer-employee relationship.

It is axiomatic that one becomes an employer or an employee only on the basis of a *contract* express or implied (See 56 C.J.S. 24, 35 Am. Jur. 450). There could hardly be an *implied* contract that plaintiff was assuming employer obligations toward applicant when there was an *express* contract that Nelson was assuming them and applicant knew the terms of that express contract. The single act which most clearly reveals which entity applicant believed to be his "employer" and to have compensation responsibilities with respect to him is this: When he sustained his injury, he reported it to Nelson, not to plaintiff (Record 46). Moreover, Nelson immediately filed the First Report of Injury (Record 3) as the employer.

POINT II.

THE INDUSTRIAL COMMISSION ERRED IN BASING ITS CONCLUSION AS TO WHO WAS APPLICANT'S EMPLOYER ON THE EVIDENCE AS TO WHO GAVE DIRECTION RATHER THAN WHO HAD THE RIGHT TO CONTROL APPLICANT.

Reviewing again the provisions of contract between plaintiff and Nelson, they are these:

1. Nelson would supply personnel trained to do the work.
2. Nelson could withdraw them at his discretion at any time.
3. Plaintiff would pay Nelson the wages of the Nelson employees assigned to the work plus 20%.
4. Nelson would assume all employer obligations with reference to the employees assigned to the job.

It is true that, to the degree applicant was directed in the conduct of the work, he received his direction from plaintiff. His directions did not relate to the *manner* of performance but to the *place* of performance. So far as the evidence shows, nobody at plaintiff's office knew how to direct applicant in the performance of the work; that's why plaintiff contracted with Nelson. Applicant's testimony on the point is as follows:

> Q. The only communication you had with Mr. Christensen, or anyone at Deseret Engineers —while you were engaged on these surveys— was the communication you had in the mornings, when you would pick up the instructions about what areas to survey?
>
> A. Right. Or any question that I might have during the day that I might call him and ask him about.
>
> Q. How frequently did you do that?
>
> A. At least once a day I tried to call in.
>
> (Record 50)
>
> Q. And what was the nature of these phone conversations that you would have with him?

A. Oh, some problem I'd run into of a building that wasn't on the survey, that I thought ought to be looked at, or some minor question.
(Record 53)

Nevertheless, it was on this evidence of direction that the Industrial Commission concluded applicant had become plaintiff's employee. We submit that the despositive question in determining whether an employee has temporarily changed employers is not who gives directions but who has the basic right of control.

The cases, in this jurisdiction and elsewhere, recognize that there can be a situation where an employee of one employer becomes temporarily the employee of another so that the second employer assumes the compensation responsibility. This is, of course, an unusual situation and is not to be implied whenever, for the benefit of his general employer, an individual submits conditionally and temporarily to direction from a third person.

The editors of American Jurisprudence state the prevailing view succinctly at 58 Am. Jur. 812:

> ". . . the rule may be stated to be that a general employer, that is, the employer contracting directly with the employee, is liable for workmen's compensation in the event of an injury to the employee unless it is shown by the terms of a loan hiring or similar arrangement that the general employer relinquished for the time being *all primary benefits and substantial right to control. . .*" (Emphasis added)

It is obvious from the evidence in this case that Nelson did *not* relinquish *all* primary benefits. He was being

paid for the work on a cost plus 20% basis. It is the grossest imposition on credulity for Nelson to contend that he received such a premium for the mere maintenance of the applicant's payroll record. This kind of premium constitutes a primary benefit from the performance of the employee. This is particularly true since the fall is the slack season for Terminex, and this contract with plaintiff enabled Nelson to keep his labor force and produce revenue to defray costs of office overhead and general supervision.

It is further evident that Nelson did not relinquish the right to control the applicant. It would have been no violation of his contract with plaintiff for Nelson to have removed applicant from the civil defense survey activity at any time. As a matter of fact, applicant had returned to his Terminex employment for the two or three days before the accident (Record 45). Nelson's right to withdraw Terminex employees at any time was, in fact, a primary term of the Deseret-Nelson understanding. This retained right *is* the fundamental right of control.

It is true, of course, that Deseret gave applicant some instructions as to the scope of the work to be done. Even if these instructions constituted "direction of the work," which we do not concede, the determining question is not who gives directions to the employee but who has the fundamental *right to control*. In *Beany* v. *Pan-Arpin Van Lines*, 200 A.2d 592, the court reviewed the authorities and stated the test as follows:

> "the status of a person as an employee depends upon whether the employer has or has not retained power of control or superintendence over him. The final test is the *right* of the employer to exercise power of control rather than the actual exercise of such power."

There are a number of cases (involving the rental of tractor and trailer rigs with drivers) which support the proposition that the giving of instructions by an alleged "special employer" about what goods should be moved and where to pick up and deliver does not constitute the renter, even though he be in the same business, the employer of the driver of the renter rig. See *Rantes* v. *Michacaggo Motor Exp., Inc.*, 52 NW 2d 602; *Stine* v. *Borst*, 205 A2d 650; *Hargis* v. *United Transports*, 274, SW 2d 110.

In *Creech* v. *Sirkin*, 88 SE 2nd 697, the Georgia Court held that the exercise of day to day control over a building contractor's employees by a property owner did not create a special employment relationship even though the claimant believed the property owner had the right to fire him.

All these cases directly or indirectly state the concept which is perhaps most significant in these special employment cases, the concept that a new employment contract is not lightly to be inferred. The Massachusetts Court put it this way in *Sargentelli's Case*, 117 NE 2d 828:

> "The willingness of the employee to work under the direction of Vernon did not of itself make him

> its employee of the new employer'' . . . "And to become an employee of the new employer, Vernon, he must enter into a new contract of employment.''

It goes without saying that a new contract of employment involves the meeting of the minds of both parties to it. Plaintiff never negotiated with applicant with reference to conditions of employment or wages and never recognized him as an employee in any of the myriad customary ways. So far as Deseret was concerned, it was contracting with Nelson for a service, not hiring employees.

CONCLUSION

None of the tests of special employment can be discerned in this case. The general employer, Nelson doing business as Terminex and as a consulting engineer, had not relinquished the primary benefits of Applicant's service nor the fundamental right to control that service. All the indicia inherent in recording keeping point to Nelson as the employer, and there is no evidence of any contract or conversation which could be construed as a contract between Deseret and Applicant. There is one further fact which speaks clearly as to the entity to which the Applicant really looked as his employer. *When he sustained his injury, he reported it directly and unhesitating to Terminex which immediately filed an Employer's First Report of Injury.*

Nelson and plaintiff clearly contracted for Nelson to assume the obligation of providing compensation in-

surance ecoverage for applicant, *and Nelson did provide it.* The defense here is by an insurance company which seeks to avoid paying compensation for injury to an employee on whose wages it has been assessing premium for years including the periods he has been engaged in exactly the activity which produced his injury.

The evil of this decision is that it adopts a concept that any homeowner who contracts for engineering or any other professional or semi-professional services and gives direction to the personnel sent to perform the services suddenly becomes the employer and subject to all the liabilities of an employer.

Respectfully submitted,

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