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 : Respondents' Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DESERET ARCHITECTS AND ENGINEERS and NORTHWESTERN NATIONAL INSURANCE COMPANY,
Plaintiffs-Appellants,

vs.

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

Case No. 11139

RESPONDENTS' BRIEF

Petition for Review of Decision and Order of the Industrial Commission of the State of Utah

ROBERT D. MOORE
530 Judge Building
Salt Lake City, Utah
Attorney for Defendants-Respondents

CLYDE, MECHAM & PRATT
by Frank J. Allen
351 South State Street
Salt Lake City, Utah
Attorneys for Plaintiffs-Appellants

PRINTED BY SALT LAKE TIMES

TABLE OF CONTENTS

CASES CITED

TEXTS CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

DESERET ARCHITECTS AND ENGINEERS and NORTHWESTERN NATIONAL INSURANCE COMPANY,
Plaintiffs-Appellants,

vs.

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

Case No. 11139

RESPONDENTS' BRIEF

STATEMENT OF FACTS

This case involves a controversy between two insurance carriers. The question presented is who is liable for Workmen's Compensation to the claimant, Murrel Hockenbury, Jr. It is not disputed that on or about

January 16, 1967, that Mr. Hockenbury suffered an injury which occurred during the course and scope of his employment. The defendant, The State Insurance Fund, was on this date the insurance carrier for Terminex, Inc. The plaintiff, Northwestern National Insurance Company, was the insurance carrier for Deseret Architects and Engineers.

A hearing was had in this matter on April 24, 1967, whereby the facts set forth above were agreed to by the parties. (R. 20 & 21)

Prior to the fall of 1966, the applicant was employed by Terminex, Inc. as a salesman in regard to pest control services. Mr. Hockenbury's duties for Terminex were to sell the services of this employer based upon "leads" received by personal contact, telephone and advertisements. (R. 22) During the period of time that the applicant was performing these duties, he was furnished a company truck by Terminex. (R. 23) The applicant would report to the office in the morning and obtain the company truck prior to commencing work. (R. 24) The truck carried an identification entitled "Terminex of Utah." (R. 24) Also, a company uniform was issued to him in the form of a white smock which had a designation on the back for "Pest-Control Service." (R. 25) The applicant received compensation based upon a guaranteed wage of $3.10 per hour for 40 hours per week plus a commission in regard to his sales so that he earned approximately $850.00 per month. (R. 26) On some occasions he used his own

vehicle in selling the services of Terminex for which he would receive no reimbursement. (R. 26) The defendant Terminex, Inc. is a corporation of which the applicant owns a substantial percentage of the outstanding stock. The claimant had, on prior occasions, that is, in 1962 and 1964, done survey work for a short period of time. (R. 47 & 48)

The plaintiff in its brief seems to indicate that in the month of October, 1966, when Hockenbury changed his duties, he was essentially performing the same functions that he had done prior to the time that he left Terminex, Inc. The record is clear, however, that the duties that he was assigned to in the fall of 1966 varied in great detail. When asked on examination the following question the claimant answered as follows:

> "Q. Now, directing your attention to this October or November time, did your duties change in any manner?
>
> "A. Extremely." (R. 27, 28)

It appears from the record that Mr. Hockenbury's direct supervisor, Mr. Nelson, was contacted by an officer of the plaintiff, concerning the borrowing of employees from Terminex. Mr. Christensen, a representative of Deseret Architects and Engineers, testified as follows:

> "In this conversation with Mr. Nelson, Mr. Hockenbury and Mr. Schmidt were made available to us, on the basis that we would take them at the time that they were not needed at Terminex, that we would reimburse Terminex of Utah

their standard hourly rate, plus 20% for payroll tax deduction and office overhead, and this type of expenditures relevant to payroll." (R. 70)

As mentioned earlier, at this time Mr. Hockenbury's duties varied in great detail. He returned his uniform to Terminex and entered into a new arrangement in regard to compensation. When working for Deseret Architects and Engineers he was paid a salary based on an hourly basis plus time and a half for overtime over a forty hour week. Obviously, he received no compensation based upon commissions because he was selling no particular service or product at the time he was employed by Deseret. He was compensated for the use of his own automobile at 10c a mile by Deseret.

On reporting to the office of Deseret Architects and Engineers he was given a list of places to survey. He would determine by personal inspection if the buildings had basements and, if so, whether they would be a proper fallout shelter (R. 32). After he made contact with the addresses furnished him he would examine the blueprints of the building in order to determine whether or not they would be appropriate for fallout shelters and if he could not obtain these blueprints, he would measure the sides of the building and draw a diagram of the building (R. 33). The forms used and all directions were given by Deseret. When he finished a list of particular areas he would go back to Deseret and report to them and receive another list.

It is clear that once the claimant commenced to work for Deseret then in no manner did Terminex direct

him in the performance of any of his duties. The uncontested testimony came from the applicant himself when he testified as follows:

"Q. Did Mr. Nelson tell you what to do on this job?

"A. No.

"Q. Did he tell you how to do it?

"A. No.

"Q. Did he ever delineate any duties you had to do subsequent — meaning afterwards, after this date — for Deseret Architects?

"A. No.

"Q. Did anyone at Terminex, Inc. ever recommend or tell you what to do in regards to the time you were connected with Deseret Architects?

"A. No."

Also at Record 38 the applicant testified as follows:

"Q. When you were performing this survey work, were you at any time instructed what to do by any representative of Terminex, Inc?

"A. No, sir.

"Q. Did they in any manner tell you what your duties would be, when you were conducting this survey?

"A. They did not.

"Q. Now you feel that your employer, during this period of time, was the Deseret Architects?

* * *

"A. Well, I will answer this way, I reported to Mr. Christensen on the mornings when I went to his office to do the survey work."

The applicant testified (R. 47) as follows:

"Q. Was there any individual at Terminex Corporation you considered to be your immediat. superior?

"A. Not while I was working with Deseret."

The record is clear, therefore, that once the applicant left the services of Terminex that they nor their officers in no manner attempted or did control the applicant's actions.

The applicant after reporting for work for the plaintiff Deseret Architects and Engineers was instructed how to prepare the forms which were necessary in compiling the data in question (R. 43). All instructions were given by a representative of Deseret. Also, a camera was furnished to the applicant for the taking of the pictures of the buildings in question (R. 43). Once the claimant completed a particular project he returned his work to Deseret and received other locations. He was furnished a manual which set forth the basic instructions in the compilation of the material in question.

He reported daily to the office of Deseret Architects and either talked to Mr. Christensen or his secretary as to a building that wasn't on the survey or which he thought ought to be examined.

The plaintiff's brief both in the Statement of Facts and Argument emphasizes the fact that the defendant Hockenbury reported his injury to Terminex, Inc. rather than to Deseret Architects and Engineers. The implication that the plaintiff draws from this fact is that the claimant himself considered himself an employee of Terminex rather than Deseret Architects. The tesimony cited above negates this implication or inference. The Hearing Examiner, however, in this case made inquiry of the applicant as to his reason for reporting his accident to Terminex and he testified at R. 55 as follows:

> "Q. And you reported the injury to Terminex. Why didn't you report it to Deseret Architects? Was it more convenient for you, or what?
>
> "A. Well, I decided after I had fallen that it would take me five minutes to get up, and it was about the time I went home, and that it is on the way home. So I would have them contact them that I had fallen."

ARGUMENT

POINT I

THE COMMISSION'S FINDING OF AN EMPLOYMENT RELATIONSHIP EXISTING BETWEEN THE PLAINTIFF AND THE DEFENDANT HOCKENBURY IS SUPPORTED BY THE EVIDENCE.

It is fundamental and this Court has on many occasions stated that when one appeals from an order of the Industrial Commission the issue presented is not whether or not the Supreme Court would have interpreted the facts differently, rather, the question presented is whether or not the Commission's ruling is based upon competent evidence. It is submitted that in this case the order of the Industrial Commission cannot be said to be arbitrary and capricious. The order on file herein (R. 116, 117, 118) lists 14 findings of fact which sustain their award in this case that the applicant Murrel Hockenbury, Jr. was an employee of Deseret Architects and Engineers at the time of the accident, and as such, its carrier, Northwestern National Insurance Group, is liable for compensation.

The plaintiffs in this case are asserting the same argument that they made to the Industrial Commission in the form of memoranda and other motions. On appeal they do not attack the findings as such but argue as to the proper interpretation to put on the evidence adduced at the hearing before the Industrial Commission. In a recent case, *Garner v. Hecla Mining Company*, 19 Utah 2d 367, 431 P. 2d 794, the court set forth the burden that the appellant has in cases involving rulings of the Industrial Commission and spoke to the question of credibility and the effect of evidence as follows:

> "Under our statutes and long established decisional law there are insuperable obstacles to the granting of the relief sought by plaintiffs on this appeal: it was their burden to show affirmatively

and to so persuade the Commission that Mr. Garner's death resulted from a disease caused by his occupation. It is the prerogative of the Commission, and not of any individual witness, or even of the medical panel, to judge the credibility of the evidence, and upon the basis of the whole evidence to determine the facts. The plaintiffs having failed to so persuade the Commission, it is the duty of this court to survey the evidence in the light most favorable to the findings and order; and we cannot reverse and compel an award unless there is credible evidence without substantial contradiction which points so clearly and persuasively in plaintiffs' favor that failure to so find must be regarded as capricious and arbitrary. Conversely, if there is any reasonable basis in the evidence, or from the lack of evidence, which will justify the refusal to so find, we must affirm."

See also *Kent v. Industrial Commission,* 89 Utah 381, 57 P. 2d 724; *Kavalinakis v. Industrial Commission,* 67 Utah 174, 246 Pac. 698; *Vause v. Industrial Commission,* 17 Utah 2d 217, 407 P. 2d 1006.

In the plaintiffs argument under Point I they reargue the inferences that should be drawn, they claim, from the evidence and state, without citing any specific authority, that there was not an implied contract between the plaintiff and Mr. Hockenbury. They have cited as being "axiomatic" that one becomes an employer or an employee only on the basis of a contract, express or implied, and cite American Jurisprudence and Corpus Juris Secundum. These general authorities set forth the proper rule to be considered in cases of this kind.

For example, at 35 Am. Jur., page 450, Section 8, the Encyclopedia states as follows:

> "The relationship [speaking to establishing a master-servant relationship] may be created by express contract but this is not essential; it may be created as well by conduct which shows that the parties recognize that one is the employer or master and that the other is the employee or servant."

The record is replete with evidence to sustain the theory that there was a contract of employment between Deseret Architects and the defendant Hockenbury (see Findings of Fact, R. 116, 117).

The evidence showed:

1. That plaintiff Deseret Architects and Engineers received the benefit of the employee's services.

2. That Deseret Architects and Engineers supervised and directed Hockenbury in his duties.

3. That Terminex, Inc. did not control or supervise in any manner his duties when working on the data survey for Deseret.

4. That the compensation and the method of payment was different when Hockenbury was employed by Deseret Architects and Engineers.

5. That the duties that the employee was engaged in differed "extremely" from what he had been doing for Terminex when he was collecting data.

POINT II

THE INDUSTRIAL COMMISSION DID NOT ERR IN ITS INTERPRETATION OF THE FACTS IN DETERMINING THAT THE APPLICANT WAS THE EMPLOYEE OF THE PLAINTIFF DESERET ARCHITECTS AND ENGINEERS.

In the Statement of Facts of this brief it appears clear that the direction given Hockenbury by the plaintiff-employer was more extensive than that set forth in plaintiff-appellant's brief. On pages ..7.. and ..6.. of the Statement of Facts a summary is made of Hockenbury's connection with Deseret Architects.

The brief of plaintiffs recognized that there is substantial authority for the proposition that an employee may be a general servant of a particular employer, however, may be a special servant of another if at the time of the accident in question the special employer was receiving the benefit of the employee's work. The defendants agree with plaintiff's proposition that the editors of American Jurisprudence state the prevailing rule at the citation given by the plaintiff, that is, 58 Am. Jur., 343, page 812. However, plaintiff's brief fails to complete the sentence quoted. Completed it reads as follows:

> " * * 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 to and substantial right to control the work, *and if, on the other hand, it is shown by any such arrangement that the general employer relinquishes the services and control of an employee so that the employee becomes for the time being subject to the supervision with another, the latter becomes liable for compensation for an injury sustained in the course of such work, and the general employer is absolved from liability therefor.*" (Emphasis added)

The assertion that Terminex, Inc. was receiving benefits from the contract that Deseret had with the government (based upon the fact that Deseret reimbursed Terminex for an additional 20% over the amount actually paid to Hockenbury), is not supported by the record. The evidence showed that the purpose of such payment was an adjustment for other expenditures such as office expenses and payroll taxes. It is stated by the plaintiff-appellant that it is "the greatest imposition on credulity for Nelson to contend that he received such a premium for the mere maintenance of the applicant's payroll record." This matter was argued extensively in memorandums at the hearing below. There was no evidence that this was for a profit or a sharing in the fruits of Deseret's contract. Certainly, therefore, the Industrial Commission need not have adopted the theory of the plaintiff that a profit was derived in the survey work flowing to Terminex. In fact, the evidence was to the contrary. At R. 72 Mr. Christensen, a part-

ner in the firm of Deseret Architects and Engineers, testified as follows:

> "Q. Right. Now, in these prior surveys Mr. Nelson had an interest in the survey as such?
>
> "A. That is the way I understand it. Yes.
>
> "Q. In the survey in October of 1966 did he have any interests as such?
>
> "A. No."

The evidence is clear that the 20% figure was for the basis of maintaining the bookkeeping entry that was necessary in keeping Mr. Hockenbury on Terminex' payroll. Mr. Christensen testified at R. 70 as follows:

> "In this conversation with Mr. Nelson, Mr. Hockenbury and Mr. Schmidt were made available to us, on the bases that we would take them at the time they were not needed at Terminex, that we would reimburse Terminex of Utah their standard hourly rate, plus 20% for payroll tax deduction and office overhead, and this type of expenditures relevant to payroll."

And again, testimony of Mr. Despain, an employee of Terminex, who stated at R. 46:

> ". . . but I was given to understand that the procedure was to bill Deseret Architects and Engineers for the time spent by our men, while they were working for them, at their normal hourly rate plus 20% to cover any other additional office expense and payroll taxes."

The assumption therefore that Terminex was benefitting from the data survey is negated by the testimony

cited above; and, in light of such testimony, it cannot be argued that the Industrial Commission acted arbitrarily and capricious in failing to make the inference that plaintiffs demand.

A case that is directly in point is *Carnes v. Industrial Commission*, 73 Arizona 264, 240 P. 2d 536. The Industrial Commission denied liability to the corporation which was receiving the services of the lent employee at the time of the injury of the applicant. The Supreme Court reversed the order of the Industrial Commission.

Carnes sustained fatal injuries from an accident arising out of and in the course of his employment. For about three years prior to the date of the accident he had been employed in California by a California corporation. A few days prior to the date of the accident the manager of the Arizona corporation phoned the president of the California corporation and asked him to lend Carnes for the purpose of doing welding. Prior to this time it had been the custom to borrow skilled employees. On all of these occasions the employees would remain on the payroll of the California corporation although they would be working for the Arizona corporation. The lending employer would charge the other employer for a proportionate share of withholding and social security tax together with an amount for bookkeeping. On the date in question Carnes, the employee, was working for the company in Phoenix, Arizona welding when the accident occurred. The Supreme Court of Arizona set

forth the annotation in 58 Am. Jur. 812, §343, heretofore quoted, and faced the questions of whether or not Carnes was an employee of the Arizona corporation. The court examined an applicable statute which defined regularly employed individuals under their compensation act. (The New Mexico statute in this regard is similar to the Utah statute.) The court found that he was within the normal course of the employer's business and as such would be considered their employee. Respondent in that case made the same argument that appellant is making here in that it was stated that Carnes was a highly skilled workman and therefore did not require supervision in his work by the foreman of the Arizona corporation. As such, they urge that the Arizona corporation was not the employer because they did not supervise and control his work. The court negated this argument and stated as follows:

> "If respondent's claims were true, then we ask, could any highly skilled workman become a special employee, unless by chance his special employer had a sufficient technical knowledge and skill to direct the employee in the details of his work? We believe the correct rule is as stated in Jones v. George F. Getty Oil Company, a New Mexico case, 10 Cir., 92 F. 2d 255 at page 259: 'The controlling factor is: For whom is the work being performed, and who had the power to control the work and the employee? The authority to determine the work to be done, and the manner in which it is to be carried on, necessarily includes the right to suspend or terminate the work altogether or, possibly, to exclude the particular

> employee from the job, not including the right to discharge the employee from the service of his general employer, * * * nor need it include the actual giving of directions to the employee in connection with the work he is doing'."

The court also considered the fact that Carnes was not on the payroll of the Arizona corporation but rather on the California corporation's payroll. The court held that this fact was not persuasive and stated:

> " 'The principle is thoroughly well established at common law that an employee of one master who is loaned to another master, and who assents to the change of masters, becomes the servant, for the time being, of him to whom he is lent, and this principle has full application to the master and servant relation under the Compensation Act.'"

Another point raised in this case is the fact that the Arizona corporation did not pay premiums on the employee Carnes and the California corporation had been making premiums. This is the same argument made by the plaintiff in this case. The court held that this fact is not persuasive in determining the question of liability for compensation. It appears, therefore, that the primary test to be used in determining who is liable for compensation is who received the benefit for the work and services performed at the time of the accident. See *Jones v. George F. Getty Oil Company*, 92 F. 2d 253. Also see *Bamberger Electric Railroad Company v. Industrial Commission*, 59 Utah 257, 203 Pac. 345.

The cases cited by the respondent are, we respectfully submit, not in point. None of the cases concern

the situation of a "lent employee." For example, in *Beany v. Paul Arpin Van Lines,* 20 Atl. 2d 592 the company entered into an agreement with a third person for the lease of a tractor owned by this person. Part of the agreement was that the person who owned the tractor would furnish all labor. Pursuant to this agreement the applicant was hired by the owner of the truck and performed services for him.

In *Creech v. Sirkin,* 88 S.E. 2d 697, the owner of the property contracted with an independent contractor for services to be rendered. An employee of the independent contractor was injured. The court held that the employee did not have a right of compensation against the owner.

The fundamental rule in cases of this kind is found in a Supreme Court case of ***Denton v. Yazoo & M.V.R.*** *Co., et al.,* 52 S. Ct. 141, 284 U.S. 305, where the court held as follows:

> "Whether the railroad companies may be held liable for Hunter's act depends not upon the fact that he was their servant generally, but upon whether the work which he was doing at the time was their work or that of another; a question determined, usually at least, by ascertaining under whose authority and command the work was being done. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This

rule is elementary and finds support in a large number of decisions, a few only of which need be cited."

Plaintiff concludes its brief by stating that the error of the Industrial Commission decision is that it adopts a concept that a homeowner who contracts for services and gives direction to personnel sent to perform the services becomes an employer subject to the liabilities of the Workmen's Compensation Act. The effect of this decision is not to extend workmen's compensation to this type of situation. In order for the special employer to be held liable, he must be one subject to the Workmen's Compensation Act as defined by statute. Certainly the homeowner as set forth by plaintiff in his example would not fall into this category. See *Ocean Accident and Guaranty Corporation v. Peter Poulsen*, 244 Wis. 286, 12 N.W. 2d 129, 152 ALR 810.

From the foregoing it appears clear that at the time of the accident Mr. Hockenbury was performing a service for the plaintiffs; that there was sufficient evidence to sustain the Industrial Commission's order. The plaintiff makes a point that there was no negotiation with the claimant in reference to his new employment or wages and as such he cannot be considered a special employee of Deseret.

An interesting case regarding this general problem is *Murray v. Wasatch Grading Company*, 73 Utah 430, 274 Pac. 940. In this case the issue presented was whether or not the plaintiff was the employee of the defend-

ant Wasatch Grading Company or the Denver and Rio Grande Western Railroad Company. Defendant was a construction company engaged in the construction of a state road in Utah County. The contract with the state provided that the D. & R.G. Railroad Company would provide to the contractor "competent railroad employees as may be necessary for the proper protection of the railroad property for traveling public." Because of a blasting operation it became necessary for Wasatch Grading Company to be advised in advance of the arrival of trains so that the track could be clear to permit the free and uninterrupted passage of such trains. Before plaintiff began his employment at the construction site he had been employed by the Denver and Rio Grande Western Railroad Company. A superintendent of D. & R. G. brought the plaintiff to the construction site and informed him of his wages and the hours that would be required in performing his new duties. While not engaged in communicating with the train dispatcher it was required of the plaintiff to assist the defendant's employees in removing rock and debris from the railroad track. The defendant Wasatch Grading Company carried compensation with the State Insurance Fund, however, did not list the plaintiff as one of its employees at the time of the injury. The plaintiff was injured when assisting the employees of the defendant in removing from the railroad tracks some rocks that had been thrown upon the track. The agreement between the defendant and D. & R. G. was that the railroad company would maintain the plaintiff on its

payroll and that the defendant would reimburse railroad company for the money paid to the plain by D. & R. G. The court held that in determining question of who was an employee one referred to law of master and servant. The plaintiff, when injur was working under a contract of hire and was engag in the usual course and business and occupation of construction company. The court held that under the circumstances that the employee while working a benefiting the construction company in keeping railroad track clear, was to be considered an emplo of said company and therefore his exclusive rem was against it for compensation under the Workm Compensation Act.

Certainly in this particular case there were no ne tiations between the employee and the special emplo but, nevertheless, a contract of employment was fou and the determination made that he was an emplo of the construction company.

CONCLUSION

The evidence sustains the Industrial Commissio order in this matter that at the time of the accident question the defendant Murrel Hockenbury, Jr., was employee of Deseret Architects and Engineers and it his insurance carrier, the Northwestern National L Insurance Company, is liable for all compensation.

Respectfully submitted,

ROBERT D. MOORE
Attorney for Defendants-Respondents