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UTAH SUPREME COURT
BRIEF

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

HARRY L. YOUNG & SONS, INC.,

Plaintiff,

- vs -

THE INDUSTRIAL COMMISSION
OF UTAH, and
DENNIS A. ASHTON,

Defendants.

Case No.
13866

PLAINTIFF'S BRIEF

APPEAL FROM AN AWARD MADE BY THE
INDUSTRIAL COMMISSION
OF THE STATE OF UTAH

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FILED
JAN 27 1975
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY L. YOUNG & SONS, INC., *Plaintiff,* - vs - THE INDUSTRIAL COMMISSION OF UTAH, and DENNIS A. ASHTON, *Defendants.*		Case No. 13866

PLAINTIFF'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This action is a petition for review of a workmen's compensation award made by the defendant Industrial Commission to the defendant Ashton as a result of injuries allegedly sustained as a result of an industrial accident on August 26, 1973, at Tempe, Utah.

DISPOSITION IN INDUSTRIAL COMMISSION

The defendant Industrial Commission ruled that the defendant Ashton was an employee of Harry L. Young & Sons, Inc. for workmen's compensation purposes and entitled to benefits as provided by law.

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RELIEF SOUGHT ON REVIEW

The plaintiff seeks a reversal of the Industrial Commission's Finding and Order entered in the above-entitled case, and for a determination that the defendant Ashton was not an employee of Harry L. Young & Sons, Inc., but that he was an independent contractor.

STATEMENT OF FACTS

In March, 1973, Ashton was contacted by Charles Dinneen who had a truck leased to Harry L. Young & Sons, Inc., who asked him to act as one of the drivers on his truck. (R 18-19)

Inasmuch as Dinneen was operating as a lease operator for Harry L. Young & Sons, Inc., which is a regulated interstate motor carrier subject to the Motor Carrier Safety Regulations, it was necessary for the safety director of Harry L. Young & Sons, Inc. to verify Ashton's qualifications to operate a leased vehicle under the Motor Carrier authority of Young.

At the time Ashton filled out his application so that Young could make a determination as to whether he met the Motor Carrier Safety Regulations, it was explained to him that the purpose of the processing of the papers was to determine whether he was qualified for driving under Department of Transportation and Company Safety Regulations, and he signed a form acknowledging that, which was a part of the paper work involved with Young's compliance with the Motor Carrier Safety Regulations and which set out the fact that he was not a Young employee. (R 185, Exhibit #3; and, R 208, Exhibit #23.)

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From March of 1973, to July of 1973, Ashton drove the truck owned by Dinneen and being leased for freight hauling purposes to Young, and also drove for another lease operator, Guy Sainsbury, after Dinneen's truck was wrecked. (R 41). While driving for both Dinneen and Sainsbury, he received his pay for services to them from the Intermountain Accounting Corporation which handled their accounting and disbursing for them. (R 186-188, Exhibits 4, 5 and 6)

In July, 1973, Ashton ceased driving for either Dinneen or Sainsbury, and entered into a lease purchase agreement with a corporation known as Inland Transport, Inc., a Utah corporation, for the lease with an option to purchase of a Kenworth Tractor. (R 189, Exhibit 7) Under that Lease-Purchase Agreement, Ashton was obligated to pay $585.28 per month for 34 months, plus $26.34 use tax, and to maintain insurance on the vehicle, and keep the vehicle in appropriate repair. At the time Ashton entered into the Lease-Purchase Agreement with Inland Transport, Inc., and for the purpose of using said vehicle for his gain, he entered into a Lease Agreement with Harry L. Young & Sons, Inc., referred to in the Agreement to maintain reserve account, (R 190, Exhibit 8), and in order to guarantee the Lease-Purchase payments to Inland Transport, Inc., as required under the Lease-Purchase Agreement, he entered into an additional agreement with Inland Transport, Inc. to maintain a reserve account with Intermountain Accounting Corporation from which Inland Transport, Inc. would receive their monthly Lease-Purchase payment, and Ashton would have available funds reserved in that account for the payment of his

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maintenance and repairs, the payment of his tire replacement, the payment of his insurance, the payment of his license and taxes, and the payment of his drivers. (R 190, Exhibit 8). At a later date, he executed a Power of Attorney giving one E. D. Snider the power and authority to endorse drafts issued by Harry L. Young & Sons, Inc. for the limited purpose of depositing same in the account of Intermountain Accounting Corporation to make possible the proper handling of that reserve account. (R 190, Exhibit 16).

After Ashton entered into the Lease-Purchase Agreement with Inland Transport, Inc. in July, 1973, and then started pulling loads for Young, he was paid on a per mile basis by Young depending upon the type of commodity being hauled, the weight of the load, and the distance he pulled the load with his tractor. From those settlements with Young, there were no usual employee deductions made such as F.I.C.A., Federal Withholding Tax, State Withholding Tax, or the like. (R 111-115)

He received in full all of the revenue earned for pulling loads on Young's authority, with the net amount being paid into Intermountain Accounting, Inc. pursuant to the assignment he had made so that they could take care of his operating expenses and truck payment, and he received the remainder of the gross settlement from Young without any deductions whatsoever. (R 117-119)

In the operation of his tractor, Young at no time paid any of the operating costs of same, but only paid him on a per mile basis for the freight hauling he did for

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Young. He took care of all of his own maintenance and repair of the truck, payment of his trip permits, payment for his co-driver, and was also fully responsible for the procurement of all of his overweight permits, and the payment for same. (R 98-99, 111, 123, 124, 127, 152).

In transporting a load of freight, Ashton would submit a trip plan to Young, and on that trip plan would list certain check-in points. He did not, however, necessarily have to follow that trip plan, and on several occasions failed to do so. He could arrive one or more days late without penalty, change his course in any way he wanted, with the only requirement being that he get the freight to its ultimate destination, and could refuse to take loads of freight at any time he desired. (R 103-119, 127, 162, 165)

It was while Ashton was hauling freight, under the above relationship between the parties, that he had an accident and injured his back.

ARGUMENT

POINT I

ASHTON WAS AN INDEPENDENT CONTRACTOR, AND WAS NOT AN EMPLOYEE OF YOUNG FOR WORKMEN'S COMPENSATION PURPOSES.

The Industrial Commission predicated their findings of fact and conclusions of law upon an erroneous assumption that Inland Transport, Inc., was a financing agency

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of Harry L. Young & Sons, Inc., and that Intermountain Accounting Corporation acted as paying agents of Harry L. Young & Sons, Inc. (R 245) The Industrial Commission also made the erroneous assumption that Harry L. Young & Sons was leasing a truck to Ashton; whereas, the record clearly shows that Inland Transport, Inc. was the only company that ever leased a truck to Ashton, and that Ashton's relationship with Young was to use that truck that he had leased from Inland Transport, Inc. to haul freight for Young.

At no place throughout the 165 pages of transcript or in the 24 exhibits is there any evidence at all to support the erroneous assumption upon which findings of fact were predicated that Inland Transport, Inc. was a financing agency of Young or that Intermountain Accounting Corporation was a paying agent of Young.

Exhibits 15, 15A, 17 and 18 all show that Ashton was being paid by Young as a lessor, and that he in turn paid the money into Intermountain Accounting Corporation who in turn, pursuant to an agreement that he had entered into directly with them, would pay his truck payments, his maintenance, insurance and the like, but there is nothing in those exhibits or in the testimony given before the Industrial Commission that would indicate that Intermountain Accounting Corporation was the agent of Young.

Exhibit 4, which are the check stubs that Ashton received while he was driving for Dinneen and Sainsbury indicate also, as does Ashton's testimony that he was the

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employee of Dinneen and Sainsbury and not Young, that Intermountain Accounting Corporation was acting as an accounting service to several lease operators, and not as a disbursing organization for Young.

The lease agreement, Exhibit 7, is between Inland Transport, Inc., not as an agent or a division of Young, but as a separate corporation and Ashton. Nothing within that document, or the testimony in the record would indicate that Inland Transport, Inc. was "a financing agency of H. L. Young & Sons." Without any evidentuary support for the proposition that Inland or Intermountain are divisions of or agents for Young, we must look at the relationship that existed between Young and Ashton to determine their relationship one to another. In making this examination, it must be kept in mind that Young is a regulated Interstate Motor Carrier subject to the Motor Carrier Safety Regulations and must, by necessity, inasmuch as freight is being hauled under their authority, make sure that the freight is hauled in compliance with Motor Carrier Safety Regulations.

In complying with the Motor Carrier Safety Regulations, Young's Safety Director at the time Ashton went to work for Dinneen, took an application for employment in compliance with the Motor Carrier Safety Regulation 391.23 and administered a written examination (Exhibit 3), after which it issued Ashton a Driver's Certificate of Qualification (Exhibit 1), and also a Driver Instructions Governing Enroute Meal and Routine Stops. (Exhibit 2) However, so as to clearly indicate to Ashton that the application was being processed and the test being

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given, and the Certificates issued after completion of same, only for the purpose of complying with the Motor Carrier Safety Regulations, he was required to execute a form that is the last page of Exhibit 3 (R 185), and which is also shown as Exhibit 23 (R 208). In that document, the following language is contained:

> "I, Dennis A. Ashton, fully understand and agree that Harry L. Young & Sons Company, Inc. is not my employer, and that Harry L. Young & Sons, Inc. does not employ any drivers. The statistical information which I have furnished Harry L. Young & Sons Company, Inc. is for screening purposes only, to determine whether I qualify for driving under Department of Transportation and Company Safety Regulations.
>
> "I also fully understand that my wages will be set and paid by the owner of the equipment (contractor) that accepts me as his employee and driver. I will furnish all necessary documents to the owner of the equipment (Employer) to figure and determine wages due me.
>
> "I further understand and agree that if I am accepted, I will abide by all Department of Transportation Safety Regulations and will be conversant with same."

Young is in a position, as an Interstate Motor Carrier, where it must comply with certain safety regulations, and in doing so must insist that lease-operators hauling freight over its authority also comply with those regulations. It is, therefore, in somewhat the same position that the insurance company was in in the case of *Christean v. Industrial Commission,* 113 U. 451, 196 P. 2d 502, where it, the company, exercised certain control over its salesmen

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consisting of his limitation to bind the company contractually, and the right to control the result of his work, but not to control how the work should be done.

The evidence in this case would indicate that it falls within that type of a situation. Inasmuch as the lease-operators are operating over Young's authority, it is its responsibility, in complying with the Motor Carrier Safety Regulations, to control the overall shipping results, but it does not go to the extent of directing how work should be done in that Ashton could travel over the highways he desired to travel over, set his own enroute call points, and leave and arrive when he wanted to. Even though the choice of routes between Salt Lake City and Los Angeles going to the south and west and Salt Lake City and Oakland going to the west are not that numerous, Ashton, nonetheless could elect which route to take, and his check-in points to advise Young as to where he then had the load of freight located.

Some examples in the testimony that Ashton was directing his own work, and not under the control and direction of Young are found at R 118, as follows:

> "Q. Now as I understand the situation then, your testimony is you left here and went up to Pocatello; is that correct?
>
> A. That's right.
>
> Q. And took four days off; is that correct?
>
> A. Yes, sir.
>
> Q. Did you get prior permission to take four days off?

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A. I wouldn't call it permission. They were aware of the fact I was going to take time off.

Q. So you didn't feel it was necessary to get permission, did you?

A. They don't ask me, I don't ask them.

Q. Sure. And, based upon that custom and practice, you did in fact take four days off?

A. That's right. I did."

The testimony was also to the effect that he could refuse to take loads if he wanted to, or require that they be loaded to his specifications before having to take them. Some illustrative testimony to that effect is found at R 163, as follows:

"Q. Let's be sure I understand this trip. Mr. Ashton. If you were directed to do something, and you felt it was illegal, or was in fact illegal, you didn't do it? Right?

A. I refused to do it.

Q. You weren't fired for that were you?

A. Threatened, yes.

Q. Were you fired for it?

A. No, sir.

Q. Did you still drive with them afterwards?

A. Yes, sir.

Q. Because that was your truck? Isn't that correct? You would have been legally responsible for an overweight?

A. That's right, sir.

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Q. So you told them that you weren't going to do it?

A. That's right.

Q. And, in fact, you didn't do it?

A. I did do it.

Q. But on your terms?

A. Yes, sir.

Q. You still drove with them afterwards? Right?

A. Yes, sir."

As pointed out in the Statement of Facts, Ashton was in possession of the truck under a lease with an option to purchase from Inland Transport, Inc., had no payroll deductions made by Young, but was paid strictly on a per load basis depending on where he traveled, the size of the load, and how many miles he traveled, was paid no overtime, and had none of the other usual incidences of an employer-employee relationship, but had all of the incidences of an independent contractor relationship.

This Court has dealt with the distinction between an employer-employee relationship and the independent contractor status on numerous occasions. In the case of *Maryland Casualty Company v. Industrial Commission,* 12 U. 2d 223, 364 P. 2d 1020, after noting that there was much difficulty involved in formulating an all inclusive and exclusive definition, set out the following guidelines to be considered in making that distinction, as follows:

> "* * * It is sufficient for our purpose here to observe that generally speaking an employee is one

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> who is hired and paid at some designated rate, usually specified as a wage or salary, to do work that is part of the trade or business of his employer, and is subject to continuous supervision, direction and control in performing his duties; whereas, an independent contractor is usually engaged to do some particular piece of work for a set sum for the completed job, and is not subject to such supervision, direction or control, but may pursue the work in his own way, and is responsible only for completing it as required by his contract."

In the Utah case of *Sutton v. Industrial Commission of Utah,* 9 U. 2d 339, 44 P. 2d 538, the Court also observed that the elements of control by the employer and the intent of the parties, are the most important factors, but that none of the factors, considered separately, is controlling, and that all of the facts considered together will be used in determining whether the relationship is in essence that of employer-employee or of independent contractors.

There have been several Utah cases dealing with local trucking concerns, and the question as to whether or not there was an employer-employee relationship or an independent contractor relationship existing in those cases. None of those cases have, however, been directly in point with the case at bar which deals with a lease-operator's relationship with a regulated interstate motor carrier. The cases referred to, dealing with local trucking concerns are *Kinder v. Industrial Commission,* 106 U. 448, 150 P. 2d 109; *Luker Sand and Gravel v. Industrial Commission,* 82 U. 188, 23 P. 2d 225; and *Gallegos v. Stringham,* 21 U.2d 139, 442 P. 2d 31.

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In the *Luker* case, a truck owner hired drivers and pro-rated operating costs and income with them where they were engaged in a hauling contract for a general contractor. The truck owner indicated the route to be followed by the driver, and told him that the general contractor's supervisor would tell him where to go and how much to haul on each load. Luker directed the driver to put higher sides on the truck, so as to be able to carry more gravel, which he did, and directed the driver where to haul the gravel. As part of the contract, each truck was checked by a government inspector as they arrived on the job site. In holding that Luker Sand and Gravel was not the employer of the truck drivers, the Court observed:

> "That the sand and gravel should be delivered at the Veterans' Hospital with reasonable expedition and as required by the government contractors as to quantity was all the sand and gravel company was interested in."

In the *Kinder* case, Kinder as a driver of a third-person's truck was hired to use that truck for the purpose of hauling gravel from Wasatch Sand and Gravel Pit. No directions were given him regarding the route he had to take; however, if he, or other truckers, were not hauling sufficient amounts to meet the contractor's requirements, then, he, the contractor, could hire other truckers to meet the needs. There were no set rules as to hours that would have to be worked by the truckers, or the amount of time they would be given to haul any specific load. Also, there was no requirement as to how many loads they would have to haul during any given time frame. The truckers

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furnished their own trucks, paid for their own repairs, and operating costs such as oil and gas, and the contractor was not responsible for any of these items. Under that fact situation, this court held that there was no employer-employee relationship in that the only control over the truckers exercised by the contractor was the direction as to where the load should be loaded up and where it should be unloaded.

The *Gallegos* case was distinguished from the *Luker* case and the *Kinder* case on its facts, inasmuch as that case dealt with a fact situation where a truck owner, by way of oral contract, agreed to furnish a truck, along with a driver, to the plaintiff's employer. The truck owner was then paid by the hour for the use of the truck, and as a condition of the employment, the truck had to maintain its position in the line of trucks so as to make sure that it was hauling its fair share of the overall commodity. A distinction that the Court pointed out was:

> "Defendant was told when to speed his trips and when to back up to the traxcavator and when to drive away, and he could not haul dirt in any other manner than as he was told.
>
> "* * * If the driver of the truck failed to maintain his position in line, the foreman of Gibbons and Reed could stop the truck from hauling.
>
> "* * * Because Gibbons and Reed paid $10.00 per hour for the use of the truck, including the driver, it could not afford to let the driver determine the amount of work to be done. Such a rate of pay justified and made necessary the control of the movement of the truck by the company."

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The Court, in the *Gallegos* case, and in distinguishing it from the *Luker* case, the *Kinder* case, and other cases, noted the distinction was based upon the control exercised in the *Gallegos* case over the employee, which was lacking in the cases otherwise distinguished.

In distinguishing the *Gallegos* case from the *Luker* case, the Court stated:

> "The instant case is distinguished from the *Luker* case because here Gibbons and Reed Company did direct and control the movement of the truck and the pay was by the hour and not by the cubic yards hauled. Gibbons and Reed would thus be decidedly interested in the number of trips made by Stringham."

With the record showing that Ashton, after entering into a lease-purchase agreement with Inland Transport, Inc. and then putting the truck to work hauling loads for Young, on Young's interstate authority, but, with Ashton deciding when he wanted to haul loads, paying for all of his own expenses, and receiving a settlement from Young based upon the number of miles between points the load was hauled, clearly indicates that he was an independent contractor and not an employee of Young. In support of this conclusion is the fact that he was not paid as an employee, with the usual deductions being made, but was paid as an independent contractor based upon the gross contract price. Also, when he had entered into a lease-purchase agreement where he had possession and control, and ultimate direction over the use of a certain vehicle, which he chose to operate for Young as a lease operator. Exhibit 20 (R 203) insofar as that Exhibit contains registration certificates, indicates that the registered

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owner of the vehicle was Inland Transport, Inc., and Young appears thereon only as a lessee, inasmuch as Ashton, after entering into the Lease-Purchase agreement with Inland, leased the truck back on to Young so as to enable himself to operate under Young's Interstate Authority. Ashton also was maintaining and repairing his vehicle, was paying for his own trip permits, was paying his second driver, and was responsible for all overweight violations. None of these were paid by Young, and the only responsibility Young had was to pay the contract price on a per mile basis for the loads that Ashton elected to haul for Young.

Also, even though Ashton executed a trip plan in connection with each load of freight he hauled, he, and not Young, set the time when he would leave, the points where he would check in, and the time when he would arrive. There is absolutely nothing in the record that would indicate that Young required him to leave at a certain time, check in at a certain place, and to arrive at a certain destination at a given time. Testimony of that relationship is clearly indicated at R 127, where the following questions were asked and answers given:

> "Q. Did H. L. Young & Sons, Inc. set forth any formal document that would require you to drive so many miles or take so many trips, in a particular period of time?
>
> A. No, sir.
>
> Q. Therefore — if that be the case — your income would, in a large measure, depend on your own ambition and how many trips you wanted to take? Is that a fair statement?
>
> A. Yes."

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In addition to the foregoing, Young and Ashton, from the time of their first contact with each other, entered into an agreement, heretofore cited, whereby Ashton specifically agreed and understood that he was not an employee of Young, and that Young in fact had no employees who operated trucks, but that all of the truck operators were independent contractors.

The facts of this case are much closer and even stronger than the *Luker Sand and Gravel v. Industrial Commission,* 82 U. 188, 23 P. 2d 225, and *Kinder v. Industrial Commission,* 106 U. 448, 150 P. 2d 109. They are clearly distinguishable from *Gallegos v. Stringham,* 21 U. 2d 139, 442 P. 2d 31, inasmuch as the employer in that case was exercising considerable if not absolute control over the employee. That, of course, is by no means the case in the instant situation.

CONCLUSIONS

The Industrial Commission's Findings of Fact and Order should be reversed, and they should be directed to enter new findings to the effect that Ashton was not an employee of Harry L. Young & Sons, Inc.; but that he was an independent contractor, and not entitled to workmen's compensation as Young's employee.

Respectfully submitted,

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