

1976

William Timothy Savage v. Industrial Commission of Utah et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM TIMOTHY SAVAGE, aka :
TIM SAVAGE, aka W. T. SAVAGE, :
d/b/a SAVAGE CONSTRUCTION, and :
W. T. SAVAGE CONCRETE, INC., :

Plaintiff, :

Case No. 14603

vs. :

INDUSTRIAL COMMISSION OF UTAH, :
GARY WAYNE HILLIS, EXQUISITE :
HOMEBUILDERS, INC., and THE :
STATE INSURANCE FUND, :

Defendants. :

BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff seeks to reverse an order of the Industrial Commission which established that plaintiff, William Timothy Savage, et al., had employed Gary Wayne Hillis thus creating a status of employer-employee between these two parties respectively.

RELIEF SOUGHT ON APPEAL

Plaintiff, as employer of defendant Gary Wayne Hillis, was ordered by the Industrial Commission to pay compensation to Gary Wayne Hillis as a result of damages received by Hillis which were sustained in an industrial accident. Defendants request that this Court sustain the Findings of Fact, Conclusions of Law and Order of the Industrial Commission.

STATEMENT OF FACTS

While defendants agree with the basic factual statement in plaintiff's brief, it is felt that emphasis should be placed on certain facts which were given only cursory treatment therein.

In obtaining the particular job in question, defendant, Hillis, called plaintiff, Savage, when he became aware of Exquisite Homebuilders' need of a new subcontractor for cement work. (Tr. pg. 11). Hillis did not have the required contractor's license and could not, therefore, take on the job himself. He knew Savage had such a license. In fact, the same arrangement had been used on other jobs. Both men sought work together, Hillis as an employee of Savage because only one man had the license required to subcontract in this state. (Tr. pgs. 26-27) In seeking the particular work in question, as in times past, the two men discussed the employment agreement on the morning they first talked with Exquisite Homebuilders (Tr. pgs. 22-23) This was before either party did any work on the subdivision in question, the actual date being September 20. (Tr. pg. 22) Consistent with their agreement with each other and with Exquisite Homebuilders, once the work was completed, Exquisite paid Savage who in turn paid Hillis. (Tr. pg. 23)

It is true that Exquisite called Hillis personally to begin the work which resulted in Hillis' injury, (Tr. pg. 14) but it is also true that Exquisite first tried to contact Savage and could not because he was out of town. Given the foregoing discussion of facts, the only reasonable inference possible is one consistent with the thought that since Savage, the subcontractor, is out, we will call his man Hillis to get the job done. To infer from the

phone call that Hillis was an employee hired separate and apart from Savage is not realistic. This is especially true in view of the fact that Savage finished the work in question. Mr. Hillis stated at page 28 of the transcript:

Q. And it was your understanding, was it not, that these people had contracted through Mr. Savage, because he was a licensed contractor to do a particular job?

A. Yes, sir.

(See also Tr. pg. 41, lines 15-19).

ARGUMENT

POINT I.

THE FINDINGS OF FACT OF THE INDUSTRIAL COMMISSION WERE BASED ON SUBSTANTIAL EVIDENCE PRESENTED AT THE HEARING AND WERE ENTERED PURSUANT TO § 35-1-85, UTAH CODE ANNOTATED, 1953.

§ 35-1-85, U.C.A., 1953, reads:

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. The commission and every party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the court shall enter judgment either affirming or setting aside the award. [emphasis added]

In interpreting this section, the Supreme Court has said in McVicar v. Industrial Commission of Utah, 56 U. 342, 191 P. 1089, (1920), at 1090:

The record is not without evidence to support the findings and conclusions of the commission If the commission erred in its findings of fact and conclusions, we cannot correct the error Since it does not clearly and indubitably appear that the discretion of the commission has been abused, its decision is final and unassailable. [citation omitted, emphasis added]

While that case was discussing the issue of dependency and the Court there states that dependency is a question of fact, certainly it cannot be argued that the existence of an employer-employee status is not also a question wherein the commission must consider various facts and arrive at a conclusion. Once having done this the determination of the commission is final and not subject to review.

When plaintiff asks the court "to reverse the findings of the Industrial Commission and enter its Order accordingly to the effect that neither William Timothy Savage, Savage Construction Company, nor W. T. Savage Concrete, Inc. was the employer of Gary Wayne Hillis on the first day of October, 1974" (plaintiff's brief at page 6), he is asking the Court to do something which it cannot do by statute.

Plaintiff's brief ignores the substantial evidence placed before the Commission which was discussed above. The Commission had credible evidence before it indicating the existence of an employer-employee relationship between Savage and Hillis. It does not appear that "the discretion of the Commission has been abused", its decision on this matter should be affirmed.

Plaintiff argues at page 5 of his brief:

The fact the Mr. Savage paid cash to Mr. Hillis after the work was done and after Mr. Hillis had been injured in no way creates the condition of employer-employee as between them on the date of the injury and one cannot become an employer by acquiescence or by the creation of an employer-employee relationship which did not exist at the time simply by words used thereafter.

While those statements are true when standing alone, certainly payment of monies is one fact to be considered by the Commission and should logically be juxtaposed with the evidence indicating that prior to the accident, an employer-employee relationship was established between Hillis and Savage.

POINT II.

§ 35-1-42, UTAH CODE ANNOTATED, 1953, OFFERS RELIEF TO AN INJURED WORKMAN WHO IS AN EMPLOYEE OF A SUBCONTRACTOR BUT NOT TO THE SUBCONTRACTOR, HIMSELF.

§ 35-1-42, U.C.A., 1953, falls into a category of workman's compensation statutes which inter alia. impose liability for coverage upon a general contractor when a subcontractor does not carry coverage for its employees. Larson, Workmen's Compensation Law, Vol. 1A, § 49.11 states, "The purpose of this legislation was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor . . . " [emphasis added]

The apparent intent of such statutes, then, is to protect injured workmen. The relief granted by statute is available to the injured claimant and not to the "irresponsible and uninsured subcontractor".

It is also stated in Larson, supra, that under most statutes "the general contractor who has been required to pay compensation in these circumstances can obtain reimbursement from the subcontractor". If, in this case, the subcontractor were allowed to claim protection from § 35-1-42, U.C.A., 1953, the illogical position would be reached wherein Savage could force Exquisite to pay the benefits ordered, and Exquisite in turn could force Savage to reimburse Exquisite. It should be obvious that the legislature had no such intent in mind when they passed the section in question. As a result, Savage cannot, when he finds himself in trouble due to his own "irresponsible" action, seek protection from a statute designed to benefit his unprotected employee. To so construe this statute would kill any incentive on the part of subcontractors to carry coverage for their own employees. Their own irresponsibility would save them money in that they could avoid paying premiums for coverage because they know they can claim protection from this section and the general contractor will have to pay. The law should not and cannot be used to condone such action.

CONCLUSION

From the foregoing discussion, it can be seen that there was substantial evidence before the Industrial Commission to support their finding that an employer-employee relationship existed between plaintiff, Savage, and defendant, Hillis. There is no indication of claim that the Commission abused its discretion in finding as it did.

Finally, the benefits of § 35-1-42, U.C.A., 1953, should not protect an irresponsible subcontractor from the results of his own actions.

DATED this _____ day of November, 1976.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that a copy of the foregoing was sent to Louis M. Haynie, Attorney for the Plaintiff, 1847 West 2300 South, Salt Lake City, Utah 84119, this _____ day of November, 1976.
