1976

Rustler Lodge and State Insurance Fund v. Industrial Commission of Utah and Rayel Jensen : Brief of Plaintiff-Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

RUSTLER LODGE and STATE INSURANCE FUND, Plaintiffs-Appellants, vs. INDUSTRIAL COMMISSION OF UTAH and RAYEL JENSEN, Defendants-Respondents)	CASE NO.

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF NATURE OF CASE

This case is an appeal from an order by the Industrial Commission reversing the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge.

DISPOSITION BY THE UTAH INDUSTRIAL COMMISSION

The Administrative Law Judge ruled that the applicant was not entitled to Workmens Compensation benefits as against the Rustler Lodge and its insurance carrier, State Insurance Fund. This ruling was reversed by the Industrial Commission which held that the applicant was an employee of Rustler Lodge, rather than an independent contractor, as required by 35-1-42, Utah Code Annotated, 1953.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks a reversal of the order made by the Industrial Commission and an affirmation of the order of the Administrative Law Judge.

ABBREVIATIONS

As used herein, "Tr." followed by a number refers to the transcript of the Industrial Commission hearing and its page number.

STATEMENT OF THE FACTS

The applicant herein, on June 21, 1974, tripped and fell on a stairway while working at the Rustler Lodge at Alta, Utah. (Tr. 15) His left shoulder was dislocated and his right knee was injured to an extent requiring surgery. (Tr. 15, 16 and 18)

At the time, applicant was a skilled drywall applicator who generally operates a business with an associate, David Wagstaff, under the name Triangle Dry Wall. (Tr. 3, 4) The first contact made by the manager of the Lodge, to get this particular job done, was with the applicant's associate, Mr. Wagstaff. (Tr. 5) It was indicated that Triangle was probably not interested, as a company, in the job, but the applicant himself might handle it. The manager contacted Mr. Jensen. (Tr. 6 and 34) After this point, Mr. Larry Thompson handled the negotiations and arrangements on behalf of the Lodge. (Tr. 6)

The job in question consisted of applying some sheetrock in a storage area and in the ceiling of a conference room. (Tr. 7) The applicant made several inspection trips to the Lodge in order to estimate the materials necessary for the job, etc. (Tr. 11) Applicant was to furnish said materials but they were to be paid for by the Lodge. (Tr. 34) It was also decided that applicant would be paid $8.00 per hour. (Tr. 34)

The applicant furnished all the specialized tools involved in the job, while the Lodge furnished a visqueen drop cloth for the floor and a ladder. (Tr. 24, 25)

The Lodge is in the lodging and restaurant business. It hires the usual staff of cooks, waitresses, bus boys, etc. It has an ancillary activity of maintenance which requires a maintenance and handy man crew, but the Lodge routinely hires outside help for repairs requiring skilled services, such as electricians, plumbers, etc. (Tr. 33 and 36) There appears to be no controversy that the job in question required a skill not possessed by the usual maintenance crews. (Tr. 27 and 39)

ARGUMENT

It should be clearly understood at the outset that the facts of this case are not really questioned by either side. The issue herein is largely one of establishing all the facts, then weighing them to see which of the possible legal conclusions is best sustained by those facts.

Sommerville v. Industrial Commission, 113 U. 504, 196 P.2d 718, (1948) is a case very similar to this one. In that case the owner of a building engaged the plaintiff and another individual to make repairs to the building. Plaintiff was injured and sought compensation. The Industrial Commission denied compensation and that denial was affirmed by the Supreme Court. The Court said, at 719:

> The question of whether or not one engaged in a service for another is an employee or an independent contractor, within the meaning of the Workmen's Compensation Act, is a jurisdictional question, presenting a situation which requires this court to determine the status from the facts submitted, by a preponderance of the evidence. But where, as here, the evidence in the case is largely uncontradicted, the problem is not so much one of examining the record to determine whether the evidence preponderates for or against the conclusion of the commission, but rather of determining whether the commission drew the correct legal conclusion therefrom. (Citations omitted)

The Court went on to point out that the defendant owned and operated a coffee shop. The defendant also owned the building in question. The defendant gave an explanation as to what work was wanted. It was agreed that the defendant would furnish the materials and pay the carpenter's union scale wage of $1.50 per hour. In the course of the repair work plaintiff's eye was injured.

POINT I.

THE WORK DONE BY APPLICANT WAS NOT IN THE USUAL COURSE OF BUSINESS CARRIED ON BY RUSTLER LODGE AS REQUIRED BY 35-1-42, UTAH CODE ANNOTATED, 1953.

Factually Sommerville, supra. is distinguishable from our case because the building repaired was separate from the coffee shop. It was felt, therefore, that the repair work could not be considered a part of defendant's "usual course" of business. The language cited as well as certain facts given are helpful in the present case, and will be discussed below.

The issue of what constitutes the nature of a business was discussed in Anderson v. Last Chance Ranch Co., 63 U. 551, 228 P. 184, (1924). There defendant ranch had employed a carpenter to build a home as residence for its foreman or manager. The carpenter was injured not while working on the house, but while momentarily helping other ranch hands to carry groceries. The Court said, at 186:

> In a narrow and restricted view of the transaction, plaintiff at the very moment of his injury was an agricultural laborer. He was assisting farm laborers in moving boxes containing groceries for use on the farm. In the broader sense he was a carpenter's helper, for that was the work he had been doing all the time from the date of his employment down to the moment he stepped aside, at the request of his employer, to assist in removing the boxes. We are not inclined to dispose of the case upon the narrow view above referred to.

The Court then went on to say that the "general and usual" business of the employer was agriculture and not building construction.

Applying this case to our facts, the Commission, in the order reversing the Administrative Law Judge said that the fact that the applicant was hired as a skilled drywall applicator did not alter the maintenance situation. Apparently, the Commission felt that the applicant's work was in the nature of maintenance. If

that is true, why was it that the maintenance crew, regularly hired by the Lodge, was not asked to do the job in question? The answer is obvious. That crew lacked the skill, material and tools to accomplish the task. They did not have these items because the "usual course of the . . . business" was restaurant and overnight accommodations with some ancillary maintenance work. The job required something dehors the usual scope of work carried on at the Lodge.

POINT II.

THE LODGE DID NOT SUPERVISE AND CONTROL THE WORK.

Referring to the Sommerville case, supra., it was stated therein, at 720:

> [3] It is now well settled in the jurisdiction that the crucial factor in determining whether an applicant for workmen's compensation is an employee or an independent contractor is whether or not the person for whom the services were performed had the right to control the execution of the work.

On many occasions various factors have been discussed as aids in establishing what is meant by "right to control" work. At least two Utah cases adopt the position taken by the Restatement of the Law of Agency, § 220. See Sutton v. Industrial Commission of Utah, 344 P.2d 538, (1959); and Christean v. Industrial Commission, 113 U. 451, 196 P.2d 502, (1948).

Christean, supra., at 505, quotes from the Restatement:

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"a. The extent of control which, by the agreement, the master may exercise over the details of the work;

"b. whether or not the employed is engaged in a distinct occupation or business;

"c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"d. the skill required in the particular occupation;

"e. whether the employer or the workman supplied the instrumentalities, tools, and the place of work for the person doing the work;

"f. the length of time for which the person is employed;

"g. the method of payment, whether by the time or by the job;

"h. whether or not the work is a part of the regular business of the employer; and

"i. whether or not the parties believe they are creating the relationship of master and servant."

Since no express agreement seemed to exist between the parties subdivision a. above will be discussed later under the intent of the parties.

Beginning with subdivision b., it is obvious from the discussion above that the general business of the Lodge, including its maintenance requirements, is distinct from that of the applicant herein. The applicant testified that the patching and texturing required on this job was an art, (Tr. 26) and that he was hired for his skill at this particular art, a skill he had attained from 21 years of experience. (Tr. 27) This indicates the distinction

"contracting" rather than entering into a master servant relationship. (Tr. 37) Further, the Lodge took advice from people in similar circumstances, (Tr. 39) and they took advice from the applicant. (Tr. 36) Finally, the manager testified that when he hires professional help, such as electricians, plumbers, etc. that he does not consider them employees, nor does he withhold taxes, even when he does pay them by the hour. (Tr. 42-43)

CONCLUSION

It can be seen by following a step by step process through the Restatement that in every instance, the evidence preponderates against finding a master-servant relationship in this case. As a result, no compensation can be paid to the applicant because he was not an employee or servant as required by 35-1-42, Utah Code Annotated, 1953. It is respectfully submitted that the Industrial Commission misconstrued the facts herein. As a result the wrong legal conclusion was drawn. The Commission should be reversed and the order of the Administrative Law Judge should be affirmed.

DATED this _____ day of August, 1976.

Respectfully submitted,

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