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

Utah Supreme Court

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Robert D. Moore; Attorney for Plaintiffs-Appellants;

Vernon B. Romney; Robert J. Shaughnessy; Attorneys for Defendants-Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

RUSTLER LODGE and STATE)	
INSURANCE FUND,)	
)	
Plaintiffs-Appellants,)	
)	
vs.)	Case No. 14616
)	
INDUSTRIAL COMMISSION OF)	
UTAH and RAYEL JENSEN,)	
)	
Defendants-Respondents)	

BRIEF OF DEFENDANTS-RESPONDENTS

Answer to petition for Writ of Review of a final Order of the Industrial Commission of Utah awarding benefits to Defendant.

Robert D. Moore, Esq.
Suite 400, Ten West Broadway
Salt Lake City, Utah 84101
Attorney for Plaintiffs-Appellants
Rustler Lodge and State Insurance Fund

Vernon B. Romney, Attorney General
Utah State Capitol Building
Salt Lake City, Utah 84114

and

Robert J. Shaughnessy, Esq.
543 East 5th South #4
Salt Lake City, Utah 84102

Attorneys for Defendants-Respondents
Industrial Commission of Utah and Rayel Jensen

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Case No. 14616

BRIEF OF DEFENDANTS-RESPONDENTS

DEFENDANTS' STATEMENT OF FACTS

Plaintiff's "Statement of the Facts" is substantially correct as to the facts stated therein, but defendants wish to make the following additions and modifications to such facts:

Mr. Thompson, the manager, took Mr. Jensen over the entire job and explained what was to be done in each area. (R.16) The manager directed other employees who were installing accoustic tile as to what was to be done. (R.17) Jensen was requested by Thompson to do some patching and texturing if he was capable of matching the color. (R.16) Thompson asked Jensen to get some accoustic tile

for a ceiling. (R.17) The accoustic tile was being installed by plaintiff's employees. (R.17) Repairing of structural damage, taking care of the leaks, and general light construction was being performed all over the building. (R.37,38) Plaintiffs employed three handymen and a maintenance man. (R.45)

ARGUMENT

POINT I

THE WORK DONE BY APPLICANT WAS IN FACT WORK PERFORMED IN THE USUAL COURSE OF BUSINESS CARRIED ON BY RUSTLER LODGE AS REQUIRED BY SECTION 35-1-42, UTAH CODE ANNOTATED, 1953.

As stated by counsel for plaintiff's, "The facts of this case are not really questioned by either side". The issue is basically how these agreed facts are applied to the above mentioned statute.

Section 35-1-42(2) Utah Code Annotated, 1953 provides in part:

"....Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractor, shall be deemed, within the meaning of this section, employees of such original employer...." (Underscoring added)

The problem narrows itself to whether or not there are sufficient facts upon which the Commission based a decision that the sheetrock work was a "part or process in the trade or business

of the employer." It is respectfully submitted that there is more than sufficient evidence to support such a finding.

The administrative law judge, who originally denied the claim on other grounds, found specifically in his finding number 4. "The lodge regularly employs a dining room staff comprised of bus boys, waitresses, cooks, dishwashers, etc. and it employs three handy men and a maintenance man." (R.54) Further, in finding number 11 he states, "It is obvious that sheetrock repairs and ceiling repairs is not part of the regular business of Rustler Lodge so far as hospitality services are concerned, but it is nevertheless an ancillary activity common to most any business." (R.55) (Underscoring added)

The uncontradicted testimony of Jensen that "light construction activity was being performed all over the building" (R.37,38) by young people admittedly employed by Rustler Lodge. (R.38) The purchase and installation of accoustic tile by Rustler Lodge (R.17) all tended to show the extensive nature of the repair project unde rtaken by the employer.

Quoting from Larson on Workmens Compensation Law at § 45.31 appears the following discussion on the question of employment status:

"The closest, the most controversial and the most numerous cases on status are those involving services, such as repair, maintenance, and incidental construction or installation, that are not in the everyday mainstream of

production activity. The jobs involved range all the way from single nonrecurring projects to regularly recurring tasks requiring a large fraction of the workers time. The workers range from individuals doing odd jobs in their spare time to established businesses with many employees and customers. The employments include window washers, welders, well cleaners, watchmen, house detectives, steeple-jacks, roofers, plumbers, plasterers, painters, mechanics, machinists, engineers, electricians, carpenters, masons, boiler repairmen, blacksmiths and repairmen of all kinds.

The two poles between which the area of controversy lies are these: First, it must be conceded that, in an ordinary industrial operation, the maintenance and repair of the plant are an integral part of the business....At the opposite extreme it must also be conceded that every businessman cannot be held to be the direct employer of every plumber, electrician or painter that he might call in to do necessary work on the premises.

The problem is to draw the line."

The traditional method has been to draw the line based upon the element of supervision, direction or control over the particular individual. As Larson says: "The independence of these artisans is not to be determined by looking at the artisan or job alone, but by judging how independent, separate, and public his business service is in relation to a particular employer." (supra)

Viewed in this light it appears that under the theory of ancillary services of this employer, ie. maintenance of his building and property, Jensen was in fact engaged in the same work as the employer and "such work is a part or process in the trade or business of the employer." It was a fact that maintenance

was the service performed by Jensen and maintenance was a service being actively performed by other employees of this same employer.

In Sommerville v. Industrial Commission 118 U. 504,196 p2d 718, (1948) this court resolved the question of status by declaring it to be a jurisdictional question. The court said in part,

"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."

Unlike counsel for plaintiffs, the principal enunciated by the court is true - status is a jurisdictional question resolved by applying the facts to the applicable law - but the facts in Sommerville, supra, are clearly distinguishable from the instant case.

In Sommerville, supra, no evidence was available that defendant was engaged in maintenance and repair activities, no evidence was available that the coffee shop operated by defendants was the subject of the maintenance and repair but a building separate and distinct from the employer, no evidence was available

that defendant participated and supervised the details of the maintenance activity. No other employees of the employer were engaged in maintenance activities. For these reasons alone there is sufficient distinction on the facts without detailing all of the differences.

In Anderson v Last Chance Ranch Co., 63 U. 551,228 P. 184, (1924) the nature of the business arose as an issue because at the statutory exclusion of agricultural employees. Section 35-1-42 (2), Utah Code Annotated, 1953, provides in part:

"The words 'employee', 'workmen' and 'operative', as used in this title shall be construed to mean:

(2) Every person, except agricultural laborers and domestic servants, in the service of any 'employer' as defined in subdivision (2) of section 35-1-42 who employes one or more workmen or operatives regularly in the same business...."

The court in construing the above section was only concerned about the "general business of the employer". The court held that the "ranch company" was engaged in agricultural pursuits and not building construction. The effect of the finding was to establish that the "employer" was in fact not a covered employer under the act and the claim of the employee failed.

The claim failed - not because the employee was in a different status from that of the employer. The claim failed because the employer was excluded from required coverage because the employer was engaged in agricultural pursuit.

It appears that this case actually presents an argument in favor of defendants since the court applied a broader rule about status and said:

"In a narrow and restricted view of the transaction, plaintiff at the very moment of his injury was an agricultural laborer....In the broader sense he was a carpenter's helper...We are not inclined to dispose of the case upon the narrow view above referred to". Anderson v Last Chance Ranch, supra.

The court then proceeded to find - on the broader view - that the employer was basically agricultural and not subject to the act.

Suffice it to say that the activity engaged in by Jensen was a part or process of the trade or business of Rustler Lodge. Maintenance and repair constituted a substantial portion of this employer's business at the time of the accident. Jensen was engaged in maintenance and repair of that business.

POINT II

THE LODGE DID SUPERVISE OR HAD THE RIGHT TO SUPERVISE THE WORK OF JENSEN.

It is well settled in this state that the status of an employee is essentially determined by either the supervision in fact of the details of the work of the employee or the right to exercise such supervision.

In the Sommerville case, supra, the court held:

"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."

With this general statement, the plaintiff then proceeds to the Restatement of the Law of Agency, § 220. The administrative law judge proceeded on the same basis and listed nine separate tests the Restatement uses to establish the distinction between servant and independent contractor.

This court has already stated the "crucial factor" in determining the status is "whether or not the person for whom the services were performed had the right to control the execution of the work." Sommerville, supra.

Let us here review the facts on the element of control. Thompson took Jensen over the entire job and explained what was to be done in each area. (R.16) Jensen was directed to obtain accoustic tile. (R.18) On his first appearance for work Jensen was told he could not work. (R.20) Employer told Jensen where to stack the sheetrock. Jensen was directed to use care and protect the floor. (R.21) Texturing and matching was discussed by Thompson. (R.16) Rate of pay was set by owner. (R.22) Ladders were supplied by lodge. (R.31) What more need be said on the elements of control, in fact, without discussing the right to control.

In Plewe Construction Co. v. Industrial Commission, 12 U. 2d

223, 364 P.2d 1020 the matter of control by a general contractor over a subcontractor was discussed at length. In that case a roofing contractor employed shinglers and paid them by the square to install a roof on a building erected by the general contractor. An employee of the roofing contractor was hurt. The roofing contractor had no insurance but Plewe, the general contractor did. Plewe's control consisted of advising the roofers to lay the shingles straight and use a chalk line. The court held that Plewe exercised sufficient control over the work to find that the employees of the subcontractor were statutory employees of Plewe and entitled to benefits.

In a more recent case this court again spelled out the criteria to use in arriving at this nebulous thing called control or right to control. In Harry L. Young and Sons, Inc. v. Industrial Comm. 538 P.2d 316 this court said:

"This is one of the frequently encountered cases which justifies the view taken by the commission that the employer wanted the 'best of two worlds'. On the one hand, to have a person rendering the service over whom he can maintain a high degree of control; and at the same time give the person the status of an independent contractor to avoid the responsibilities he would have to an employee. The trouble arises when an employee is injured he wants to be classified as an employee and get workmen's compensation.

- - - -

In determining whether the statutory requirements are met, the courts have considered numerous factors relating to the employer-employee relationship, and have

pointed out that none of them considered alone is completely controlling, but that they all should be considered together in determining whether the requirements of the statute are met.

Speaking in generality; An employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set sum, who may do the job his own way, subject to only minimal restrictions or controls and is responsible only for its satisfactory completion.

The main facts to be considered on the relationship here are: (1) whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment, i.e. whether in wages or fees as compared to payment for a complete job or project; and (4) the furnishing of the equipment."

I submit that if the facts in this case are measured against the standards set forth in the Young case above, the finding of the employer-employee relationship is the proper finding in this case.

POINT III

ASSUMING JENSEN IS NOT AN EMPLOYEE BUT AN INDEPENDENT CONTRACTOR, JENSEN IS A STATUTORY EMPLOYEE UNDER THE TERMS OF SECTION 35-1-42(2) UTAH CODE ANNOTATED, 1953.

Section 35-1-42(2) Utah Code Annotated, 1953, is quoted above under Point I. The significance of the quoted section establishes the fact that even a wholly independent contractor may still be considered an employee of the employer if the

employer "retains supervision or control and such work is a part or process in the trade or business of the employer."

The question of the "work as a part or process in the trade or business of the employer" was thoroughly discussed in Point I above. The question of status was reviewed in Point II along with the exercise of control.

For purposes of argument we now assume that Jensen was in fact an independent contractor as claimed by plaintiffs. Does this status preclude him from benefits? It is respectfully submitted that it does not.

In the Plewe Construction Co. case, *supra*, a statutory employee was created. The roofing contractor in that case was truly independent. However, Plewe exercised some minimal control and such minimal control was sufficient to create the statutory employee.

This court has held in a number of cases involving third party liability under the workmen's compensation act that subcontractors and employees of subcontractors are precluded from suing other subcontractors or general contractors in tort because all are considered to be in the same employment. See Gallegos v. Stringham, 20 U. 2d 139,442 P.2d 31; Smith v. Alfred Brown Co., 27 U.2d 155,493 P.2d 994. All of the decisions in this area are essentially based upon the proposition that all the individuals involved are in "the same employment."

Section 35-1-62, Utah Code Annotated, 1953, provides in part:

"When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee...may have an action for damages against such third person..." (Underscoring added)

In all the decision construing this section, the exclusion was extended more broadly than one would normally expect in holding all parties to be in the same employment. In some cases little or no evidence of control was maintained by the general contractor. In fact, in suits between subcontractors employes none existed.

If Jensen were to sue in tort for the negligence of Rustler Lodge, rest assured that the defense would be "same employment", effectively preventing Jensen from any remedy.

In the Gallegos case, supra, the Smith case, supra, Peterson v. Fowler, 27 U. 2d 159, 493 P. 2d 997; Adamson v. Okland Construction Co. 29 U.2d 286, 508 P. 2d 805 the control exercised by the employer was minimal at best. But in all cases, the parties were all found to be in the same employment.

The element of being engaged in the same type of work is clearly present. The element of control - to whatever degree one wants to find - is present. The status of Jensen as an independent contractor can be inferred. The ultimate fact appears

that Jensen is either a direct employee of Rustler Lodge or a statutory employee of Rustler Lodge. He must be one or the other.

CONCLUSION

By careful analysis of the facts as determined by the Industrial Commission and weighing them against the statute, the conclusion reached by the Commission is inescapable. Jensen was an employee of Rustler - either direct or statutory. The Commission reached a proper result in applying those facts against the appropriate law. Such decision should be affirmed.

DATED, this _____ day of October, 1976.

Respectfully submitted,

ROBERT J. SHAUGHNESSY,
Attorney for Defendants-Respondents
543 East 5th South #4
Salt Lake City, Utah 84102

VERNON B. ROMNEY,
Attorney General
Utah State Capitol Bldg.
Salt Lake City, Utah 84114

MAILING CERTIFICATE

I certify that two true and correct copies of the foregoing
briefs were mailed to Robert D. Moore, Esq., Ten West Broadway
Building, Suite 400, Salt Lake City, Utah 84101.

ROBERT J. SHAUGHNESSY