

1942

Southern Oil Company v. Department of Placement and Unemployment Insurance, and Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

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69430

In the Supreme Court

OF THE

State of Utah

NORTHERN OIL COMPANY,
Appellant,

vs.

DEPARTMENT OF PLACE-
MENT AND UNEMPLOY-
MENT INSURANCE and
INDUSTRIAL COMMISSION
OF UTAH,

Defendants.

Case No. 6373

BRIEF OF DEFENDANTS

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FILED

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DEPARTMENT OF PLACE-
MENT AND UNEMPLOY-
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OF UTAH,

Defendants.

} Case No. 6373

STATEMENT OF THE CASE

This case arises out of a petition for review filed by the Northern Oil Company as an appeal from a decision rendered by the Industrial Commission of Utah with respect to the contribution liability of the Northern Oil Company under the provisions of the Utah Unemployment Compensation Law, Chapter 52, Laws of Utah, 1939.

The company is an employer subject to the provisions of the Utah Unemployment Compensation Law, and it was so subject during the years of 1938, 1939, and 1940. Over such a period of time, it continuously filed reports and paid contributions with respect to its employment.

In the early part of 1941, an audit was made of the records of the company which disclosed a failure upon the part of the company to report the remuneration paid by the company to solicitors who were paid on a commission basis and upon remuneration paid to officers and other employees in the form of stock.

On the basis of this audit, an initial determination was rendered on February 13, 1941. The company questioned the propriety of the determination and filed an application for review resulting in a review decision dated March 18, 1941, which review decision upheld the previous decision.

On March 25, 1941, the company filed an appeal before the Appeal Tribunal. Hearings were held April 2 and April 5, 1941, and a decision rendered on April 19, 1941, which, although modifying the initial determination by excluding certain of the stock payments, upheld the position of the Department of Placement and Unemployment Insurance that the commission solicitors were "in employment" within the provisions of Sections 19(j) (1) and 19(j) (5) of the Utah Unemployment Compensation Law, that remuneration paid to its officers and employees by means of stock certificates constituted "wages" within the meaning of Section 19 (p) of the Utah Unemployment Compensation Law, upon which the company owed contribution liability and that the value of such stock was ten cents per share.

On April 28, 1941, an appeal to the Industrial Commission was filed by the company, which appeal resulted in

the decision of the Industrial Commission, dated May 9, 1941, upholding the decision of the Appeal Tribunal from which the petition to this court was filed.

STATEMENT OF THE FACTS

The Northern Oil Company is a corporation and was during the years 1938, 1939, and 1940 engaged in the business of promoting the drilling of an oil well and of selling stock of the company to the public for the purpose of financing such drilling operations.

In selling the stock of the company, it created a selling organization made up of a sales manager who was in charge of the activities of several division managers. The division managers, in turn, were among other things required to create selling organizations under them formed of solicitors, the type of worker whose status is questioned herein. (Tr. 12, 13) For such services the division manager was paid a gross commission of twenty-five per cent of all sales of stock made by him. With this twenty-five per cent commission, the sales manager was authorized to pay such expenses as he found necessary to procure the services of solicitors and conduct selling activities. Any balance remaining was to be considered his net earnings. (Tr. 14-18) He was subject to the supervision and control of the sales manager, adapted his selling system to the organizational program of the sales manager, and was concededly by stipulation of the parties "in employment" for the company. (Tr. 46)

The division manager followed the practice of contacting various individuals to learn if they desired to act for him as solicitors and arranged to pay them a percentage of the stock sales as a commission. (Tr. 18) Upon making such an arrangement with any solicitors, the division manager would advise the company of the arrangements made in order that the company could, at regular intervals, pay to the division manager and the solicitors their respective commissions. (Tr. 12-17, 33, 36) Payments to the solicitors were made by checks of the company or more generally by means of cash pay envelopes obtained by the solicitor from employees of the company.

With this type of sales organization, the company evolved a selling system which was regularly followed during the period in question. The solicitors, whenever possible, attended sales meetings conducted every morning by the general sales manager; such sales meetings would be attended by the division manager and by the solicitors. (Tr. 20, 37) During such sales meetings, a discussion of sales methods would be had, the solicitors would be given a description of the progress made in the drilling of the oil well and, in general, "enthused" with the progress and advancement of the company.

The solicitors were given invitation cards (Department's Exhibit No. 4) which were advertised as being complimentary tickets to illustrated lectures and which offered the guest beautiful attendance prizes absolutely free. The ticket stated the place and time at which such

illustrated lecture would occur, required the bearer to place his name and address thereon, and carried a space upon which the solicitor would write his name; such space stated that the bearer was a guest of the solicitor. Nowhere on the ticket was there an indication that the illustrated lecture was a method of selling stock in an oil company. The solicitor then, without detailed control as to time or territory, would make such contacts and arrange to get as many people as possible to attend such lecture. (Tr. 12)

At its place of business several evenings each week, the company regularly conducted lectures. Upon arrival at the office, the prospect was requested to give his card to an employee of the company. (Tr. 44) In this manner the company was advised as to which solicitor and which division manager was to be credited with the attendance of the prospect and was to be given the right to sell him stock. After the lecture, the solicitor would endeavor to arrange a meeting, usually that same evening, between the prospect and the division manager. This was necessary, because only the division manager had a license to sell the stock of the company. The solicitor, being unlicensed, was limited to purely "prospect getting", (Tr. 20, 38, 58) and to convincing a prospect that a purchase of stock was desirable. If a sale was made, the solicitor would become entitled to a commission based upon the amount of such sale.

One of the witnesses testified that she received eight per cent for bringing in the prospect, and if she was in

attendance in the office of the division manager when the sale was made, she was entitled to an additional three per cent commission. (Tr. 12, 34) As stated above, this percentage of commission was set by the division manager and deducted by the company from his twenty-five per cent commission.

When a sale was consummated, the division manager would fill out a contract form (Department's Exhibit No. 2) which constituted an agreement between the prospect and the Northern Oil Company. If he collected any money on a sale, he was required to pay it to the company. He was not empowered to retain his commission or to retain the solicitor's commission. (Tr. 17)

The value of the stock for purposes of such sale was set by the company, and during this period of time, such stock was sold at a par value of ten cents per share. (Department's Exhibit No. 3)

When a division manager left the employ of the company, those of his solicitors who desired to continue to perform services for the company were assigned to other division managers by the sales manager. (Tr. 40)

In this case we are also concerned with the contribution liability of the company upon remuneration paid to certain of its officers and employees in the form of shares of stock. The status of these officers and employees is not questioned. Admittedly, they performed services "in employment" for the corporation; however, the corporation desiring to pay such individuals for their services in some means other than

cash would pay them in the form of stock. The testimony does not indicate whether or not, in making such payment, the employees and the company reached any agreement as to its value, but it does indicate that the company maintained records of all such payments and that such records reduced the share payments to dollar and cent values at a rate of ten cents per share. (Tr. 51) This is particularly clear with respect to remuneration paid in the sum of shares to Mr. Bergeson, its president, who, by minute entry of the corporation, was to receive \$200 per month in stock. (Tr. 64, 66) (Department's Exhibit "B", p. 2)

STATEMENT OF THE ARGUMENTS

The plaintiff company makes two contentions with respect to the decision of the Industrial Commission. That:

- (1) The services performed by the solicitors on a commission basis are not services "in employment" within the provisions of Sections 19 (j) (1), 19 (j) (5), and 19 (h) of the Utah Unemployment Compensation Law, and seems to argue that—
 - (a) Because the solicitors were free from detailed direction as to the time, territory, and amount of "prospect getting" they engaged in, they did not fall within the definition of "employment" contained in the law.
 - (b) They were not "in employment", because they devoted little time to such soliciting activities.

- (c) Such solicitors were not "in employment", because they merely helped the division manager to sell but did not, themselves, have power to directly consummate sales.
 - (d) Such solicitors were not "in employment", because the division managers were "never intending to hire on behalf of the company."
- (2) The Commission improperly placed a value of ten cents per share upon the stock issued to officers and others for services for purposes of determining the company's contribution liability.
- (a) The company argues that the stock had no market or cash value and that, in the absence of oil or other assets owned by the company, it could not have a value for purposes of fixing contribution liability.
 - (b) That because the company has no revenue or income and, therefore, any contribution liability must be derived from a sale of stock, the Industrial Commission improperly fixed contribution liability upon such remuneration in kind.

The Industrial Commission takes the position that:

- (1) The solicitors of the Northern Oil Company performed services "in employment" within the provisions of Sections 19 (j) (1), 19 (j) (5), and 19 (h).

It argues:

- A. That the company failed to meet to the satisfaction of the Commission the (a), (b), and (c) tests of Section 19 (j) (5).
- B. That the solicitors performed services for the corporation within the provisions of Sections 19 (h) and 19 (j) (1).

- (2) The Commission placed a value of ten cents per share upon stock issued to officers and others for services for purposes of determining the contribution liability of the company.
- A. The cash value set by the company upon its shares of stock for purposes of sale to the public constitutes a "reasonable" cash value; and
 - B. The prospects of the company to succeed in its oil venture and attain assets in addition to its equipment is "valuable".
-

ARGUMENT

I

THE SOLICITORS OF THE NORTHERN OIL COMPANY PERFORMED SERVICES "IN EMPLOYMENT" WITHIN THE PROVISIONS OF SECTIONS 19 (j) (1), 19 (j) (5), AND 19 (h).

- A. The company failed to meet to the satisfaction of the Commission, the (a), (b), and (c) tests of Section 19 (j) (5).

The question of whether or not the solicitors of the company performing services on a commission basis were engaged in the performance of services "in employment" within the provisions of the Utah Unemployment Compensation Law, again brings before this Court the interpreta-

tion of the term "employment" as used in the Law. However, it is not necessary in this brief to again re-argue the question of whether or not the Law carries its own definition of employment or is controlled by the master-servant definition of common law.

On page 9 of its brief, the plaintiff states: "... Whether there is employment must be determined initially from standards which the law affords . . ." The plaintiff concedes that the Law's definition is controlling. This is completely in accord with the position this Court has taken in the past. See its decisions in: *Globe Grain & Milling Company v. Industrial Commission of Utah, et al.*, 98 Utah 36, 91 P. (2d) 512; *Fuller Brush Company v. Industrial Commission of Utah, et al.*, 98 Utah 230, 104 P. (2d) 201; *National Tunnel and Mines Company v. Industrial Commission of Utah, et al.*, 99 Utah 39, 102 P. (2d) 508; *Logan-Cache Knitting Mills v. Industrial Commission of Utah, et al.*, 99 Utah 1, 102 P. (2d) 495; *Combined Metals Reduction Company, et al., v. Industrial Commission of Utah, (.....Utah.....)*, (September 15, 1941); and *Creameries of America, Inc. v. Industrial Commission of Utah, et al.*, 98 Utah 571, 102 P. (2d) 300.

We are solely concerned with the application of the tests contained in the Law to the facts of this case. The plaintiff company, through its brief, argues that if the elements of detailed control over the time, place, and amount

of service are lacking, the solicitors must be considered as having performed services "not in employment." Note its language on page 9: ". . . Supervision or control by the party sought to be charged as an employer over the party sought to be held as an employee must exist before there can be a relationship of employment. . . ." This argument ignores the (b) and (c) provisions of Section 19 (j) (5).

The Commission, however, takes the position that the company failed to meet even the (a) test; the company did exercise control over the solicitors. The solicitors were a part of a well organized selling system which, through a system of sales manager and division managers and illustrated lectures, depended upon co-ordinated activities by the solicitors. First of all, the solicitors were controlled as to the extent of their activities. They could not sell a prospect, because of the lack of a license to sell, but they were limited to obtaining prospects and turning them over to their particular division managers. In order to get a portion of their commission, to wit, three per cent, in the case of witness Caroline H. Albertson, they had to be present at the interview between the prospect and the division manager during which interview the sale was consummated. In order to procure the presence of the prospect at the illustrated lecture, they were required to use the device of issuing an invitational ticket. (Department's Exhibit No. 4)

A glance at the organizational system of the company discloses that the solicitors, in fact, always performed their services in accordance with the system; this in itself indicates

a control. A failure on the part of the solicitors to comply with the sales system of the company would mean a failure on the part of the solicitors to receive any commissions, because they could not negotiate sales directly. The mere fact that they could devote as little time as they desired to their activities as solicitors is immaterial; the fact remains that unless they produced, they would not be paid.

The solicitors regularly followed a pattern of activity; they attended sales meetings whenever possible at the offices of the company—usually from eight to ten in the morning—where they were taught new data concerning the company whose stock they were selling, and they were instructed in the method of procuring prospects. During the day, they devoted themselves to contacting the public, unless other private employment intervened. In the evenings, they attended the illustrated lectures and acted as “hosts” to “guest prospects.” After the lectures, the interviewers contrived to attend the interviews between the “guest prospects” and the division managers. Thus, it is seen, that although the company did not control the place where the original solicitation of the prospect occurred, it did control the place to which the solicitors brought the prospects and the place at which the solicitors were located when the division manager consummated the sale.

The facts indicate that the amount of commission each solicitor obtained was subject to the will of the division manager. If the amount of prospects obtained by him was satisfactory to the division manager, or if the solicitor

seemed to be regularly following activities incidental to his work, the division manager would tend to give him a better commission.

The effectiveness of the above controls was enhanced by the fact that the employment of the solicitors with the company was subject to termination without notice. A failure on the part of the solicitors to perform services acceptable to the company could easily result in a lack of employment upon the part of such individuals, making them proper subjects for the benefits of unemployment compensation. Unquestionably, the power of discharge is a very important element of control that may not be disregarded in determining whether or not the company has met test (a) of this Section.

We believe that the Commission, under the foregoing facts, reasonably concluded that the company failed to satisfy the requirements of Section 19 (j) (5) (a); the company failed to satisfy the Commission that:

“(a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and”

The company failed to satisfy the requirements of subsection (b) of Section 19 (j) (5), which provides:

“(b) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and”

The testimony clearly shows that the company was engaged in the business of promoting the prospecting of oil and the sale of stock necessary to secure money for such purposes. The Court's attention is particularly referred to the prospectus of the company. (Department's Exhibit No. 3) Most of the activities of the company were devoted to the sale of its stock. Nowhere in its brief does the plaintiff company contest this fact. The solicitors as well as the division managers of the company were engaged in the selling of its stock. Certainly, the Commission reasonably found that the activities of the solicitors were a part of the usual course of business of the company.

The facts also indicate that a considerable portion of the solicitors' activities occurred within the place of business of the company. They attended sales meetings therein and after issuing complimentary guest tickets were required to be present at the illustrated lectures and at the contacts between the division managers and the prospects in order to receive a portion of their commission. This fact is uncontroverted. The solicitors performed services both within the usual course of business and within the place of business of the company.

The company failed to satisfy the Commission with respect to the test contained in Section 19 (j) (5) (c) of the Law which provides:

“(c) such individual is customarily engaged in an independently established trade, occupation, profession or business.”

Nowhere in the transcript is there any indication that the solicitors were engaged in the activity of selling stock as a part of their own customary and independently established business. In most instances it seems that the solicitors became interested in the Northern Oil Company by virtue of the fact that they had attended an illustrated lecture and had been sold stock. Having once become convinced that there were good prospects of finding oil, they were willing to recommend the investment to their friends. They would then devote themselves, in their spare time, to making such contacts as they could and in procuring the attendance of prospects at the illustrated lectures. There is no conflict of fact with respect to this statement. You will note that this description is repeated on pages 9 and 10 of the brief of appellant. In fact, the plaintiff company argues that the fact that most of the solicitors were not regularly engaged in the sale of this stock is an indication that they should not be considered as performing services "in employment".

Of course, there were a number of salesmen who seemed to devote their entire time to such stock sales. Note the testimony of witness Caroline H. Albertson. This very statement of fact answers the question of whether or not these solicitors were customarily engaged in an independently established trade, occupation, profession, or business. If they had other activities, such activities were not of the same nature as the services performed for the Northern Oil Company. They were employees of other concerns earn-

ing their daily wage, or they were farmers operating their own farm. In no instance has there been an introduction of evidence indicating that any of these solicitors were engaged in a stock brokerage business. In fact, the testimony unquestionably contradicts such a conclusion. The solicitors did not have licenses permitting them to sell the stock of the company; their whole activity was limited to procuring prospects who were to be sold by their division manager. The conclusion of the transaction upon which their commissions were based was beyond their control. Such an arrangement is never true of an independently established business unit.

All of the elements of control referred to in the argument with respect to subsection (a) are elements indicative of the fact that the solicitors were not engaged customarily in independently established trades, occupations, or businesses.

The Commission reasonably concluded that the company failed to satisfy test (c) of Section 19 (j) (5).

The attention of the Court is called to a very recent decision by the New York Supreme Court, Appellate Division, Third Department, decided March 11, 1942, *In the Matter of the Claim for Benefits under Article 18 of the Labor Law Made by Thomas A. Doyle, Claimant, Kalama-zoo Stove & Furnace Co., Inc., Appellant v. Frieda S. Miller, as Industrial Commissioner, Respondent*, CCH, N. Y. ¶8310. In that case, a salesman hired by the company's

branch manager to sell stoves and furnaces was held to be an employee of the company within the meaning of the New York law. The following is the language:

"The appellant is a corporation engaged in the business of manufacturing and selling stoves and furnaces, the sales being made through factory branch offices maintained through several states. The terms and conditions under which the manager operated a branch office or store was a printed form of supervisor's commission contract. It is conceded that the branch manager is its employee within the law. In addition to the sale of appellant's products, the branch manager used appellant's office facilities and personnel for the purpose of soliciting and carrying out contracts for cleaning and repairing furnaces. Through this medium prospects were obtained for the purchase of appellant's products.

"The claimant was employed as a canvasser at the Utica office. He was furnished with a business card as follows:

Kalamazoo Stove & Furnace Company
351 Columbia St., Utica, N. Y.
'A KALAMAZOO
DIRECT TO YOU'
Trade Mark Registered
Ranges—Furnaces—Heaters
T. A. Doyle Phone 2-8513

At least in two instances he was paid by the Company's check direct from the head office and the orders he obtained went directly to the head office with his name on them.

"The evidence sustains the decision of the Appeal Board which should be affirmed.

"Decision of the Appeal Board unanimously affirmed, with costs."

B. The solicitors performed services for the corporation within the provisions of Section 19 (h) and Section 19 (j) (1).

Section 19 (j) (1) provides as follows:

“(j) (1) ‘Employment,’ subject to the other provisions of this subsection, means service, . . . performed for wages or under any contract of hire, written or oral, express or implied.”

It is concerned with the question of whether or not the worker performed services and whether or not such services were performed under the terms of a contract of hire or for wages.

In the case at hand, the solicitors undoubtedly performed services. They carried out a major part of the company's sales activities, attended meetings, procured prospects, acted as their hosts while they attended illustrated lectures, sat in attendance during meetings of such prospects, issued guest tickets, and talked about the advantages that ownership of stock of the Northern Oil Company would bring.

These services were performed as the result of agreements between the solicitors and division managers of the company. In these agreements, the solicitors were offered a commission payment based upon stock sold to any prospects that they procured for the division managers. The agreement called for the performance of services, resulted from a meeting of the minds, and provided a consideration therefor. All of the contractual elements are present. The

services were performed as the result of a contract of hire. In addition, the services were performed for wages.

Section 19 (p) of the Unemployment Compensation Law, provides that:

“(p) ‘Wages’ means all remuneration payable for personal services, including *commissions* and bonuses . . .”
(Italics ours)

You will note that the statute expressly includes as wages, remuneration paid in the form of “commissions.” The facts are clear that the services were performed for a commission. Both of the tests of Section 19 (p) are applicable.

The company contends, however, that the solicitors were not “in employment” for the company. It implies rather that they were “in employment” for the division managers, because the division managers were the individuals with whom arrangements were made. By stipulation, (Tr. 46) the plaintiff company concedes that the division managers are *employees* of the company.

The Commission therefore contends that the provisions of Section 19 (h) are applicable. Section 19 (h) provides:

“. . . Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this act, whether such individual was hired or paid directly by such employing unit or by such agent or employee; *provided*, the employing unit had actual or constructive knowledge of the work.”

With the actual or constructive knowledge of the company, the solicitors were hired to perform or to assist in perform-

ing the work of the division managers. Such an arrangement was a part of the organizational plan of the company. Although the division managers made the arrangement with the solicitors and fixed the amount of commission payable, the division managers were not permitted to pay the solicitors their commission.

As has been pointed out heretofore, any cash received from the sale of stock by the division manager was paid to the company. The company then, at regular intervals, made commission payments to the division manager and to the solicitors. It seems clear, therefore, that the company not only had knowledge of the fact that any given solicitor had been hired, but had knowledge of the amount of commission he was to be paid and the extent of such solicitor's activities.

The facts further indicate that the company knew, with respect to each illustrated lecture, the number of prospects each solicitor had secured. Each guest attending the illustrated lecture was asked to leave his invitation card at the desk.

The company urges, on page 11 of its brief, that these solicitors were not employed to perform or assist in the performance of the work of the salesmen. It argues:

“. . . They didn't do any of his work or any part of it. They merely *helped* him to increase his contacts . . . ” (Italics ours)

We submit that the word “helped” means assisted, and that the function performed by the solicitor was a very important part of the functions performed by the division manager. In fact, the volume of sales of each division manager was

entirely dependent upon the extent of the activities of his solicitors.

The company urges that the fact that the solicitors had no license to sell is an indication that the solicitors were not assisting the division manager. As a matter of fact, the lack of a license in the solicitors is an additional indication that they had no power to do anything but assist the division manager. They could not complete a sale or earn any commissions without having procured the cooperation of the division manager.

The company takes the further position that Section 19 (h) must contemplate a hiring of the assistant by the agent or employee "for the company." Section 19 (h) contains no such limitation. It is sufficient if the agent or employee of the company has employed another "to perform or to assist in performing the work" of such agent or employee. In fact, Section 19 (h) goes further and says that the assistant must be deemed to be an employee of the employing unit "whether such individual was hired or paid directly by such employing unit or by such agent or employee."

In this case, the facts clearly indicate that although the solicitor was hired directly by the division manager, he was paid directly by the company. It is unnecessary that the agent hire on behalf of the company as is argued by plaintiff company. However, we submit that the facts indicate that the division manager did hire on behalf of the company. Every act of such division manager was an act

on behalf of the company. The creation of a sales organization, the hiring of solicitors, the conclusion of each sale, and all other acts which led toward the objective of the company, to wit, the sale of stock, was an act by such division manager on behalf of the company.

II

THE COMMISSION PROPERLY PLACED A VALUE OF TEN CENTS PER SHARE UPON STOCK ISSUED TO OFFICERS AND OTHERS FOR SERVICES FOR PURPOSES OF DETERMINING THE CONTRIBUTION LIABILITY OF THE COMPANY.

In the course of its activities connected with the development of oil-producing land and the sale of stock with which to finance such activities, the services of a number of employees, including officers, were found necessary. Because of financial difficulties, however, the company paid for such services by the issuance of stock in the company. During the time that such stock payments were being made, the company was actively engaged in the selling of such stock at the rate of ten cents per share which was the par value of the stock. There was a short interval during which the State Securities Commission suspended its license to sell such security, but after some reorganization and a change of officers, the suspension was lifted and the company resumed its development and promotional activities.

The Commission used this same valuation, ten cents per share, for the purpose of determining the contribution liability of the company with respect to the remuneration paid to such employees.

Section 19 (p) of the Utah Unemployment Compensation Law defines "wages" to include:

"The cash value of all remuneration payable in any medium other than cash . . . The reasonable cash value of remuneration payable in any medium other than cash . . . shall be estimated and determined in accordance with rules prescribed by the Commission."

It is clear, first, that the choice of method of valuation is left to the Commission, and that this Court's review of the method chosen is limited to an inquiry as to whether or not such method is reasonable. This appears not only from the section quoted, but also from the general principles governing court review of the action of the administrative body that where a question is committed to the discretion of an administrative body, a reviewing court will not substitute its judgment for that of the administrative body, *Mississippi Barge Line Co. v. United States*, 292 U. S. 282; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297; *Wessel v. United States*, 49 F. (2d) 137.

It is clear, second, that the Commission's finding of fact as to the value of the stock is similarly protected from review by the Supreme Court if there is any evidence to support such a finding of fact by the administrative body, under Section 10 (h) of the Unemployment Compensation Law which provides:

“In any judicial proceeding under this section the findings of the commission as to the facts, if supported by evidence . . . shall be conclusive, and the jurisdiction of said court shall be confined to questions of law.”

For the effect given by this court to a similar section in the Utah Workmen's Compensation Act, see *Hauser v. Industrial Commission*, 77 Utah 45, 296 P. 780; *Ellis v. Industrial Commission*, 91 Utah 432, 64 P (2d) 363. As to the scope of review of an administrative valuation of stock, specifically, see *In re Lang Body Co.*, 92 F. (2d) 338; *Universal Insurance Co. v. State Board of Tax Appeals*, 118 N. J. L. 538, 193 Atl. 915; *Chicago, B. & Q. Rwy. Co. v. Babcock*, 204 U. S. 585, which are authority for the proposition that an administrative valuation will not be upset if there is any evidence on which such valuation might reasonably be made.

It is urged by plaintiff company that the stock has and had no market value, and that petitioner had no assets beyond the money collected for stock and its chance of striking oil.

That plaintiff company had no assets beyond these seems to be an allegation that the “book value” of the stock was low. That the administrative agency disregarded book value in its valuation of stock has never been regarded as a ground for upsetting the administrative valuation as unreasonable. See *Citizens National Bank v. Board*, (.....Ore.), 222 P. 341, citing Justice Holmes to this effect in *National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532; *Universal Insurance Co. v. State Board of Tax Appeals*, *supra*. Though the court in *Continental National*

Bank v. Naylor, 54 Utah 49, 179 P. 67 is limited by a definition of "actual cash value" of bank stock contained in the tax statute as construed, it cites with approval cases based on the statement of this position by Justice Holmes which holds that a "book value" is not the only reasonable basis for valuation of stock.

Plaintiff company also alleges that there is no evidence of market value in the record. It is true that stock of plaintiff company is not freely bought and sold on an exchange so that market value in the accepted sense is set for it by such transactions. Nevertheless, there is a great deal of evidence in the record that the stock has exchange value. The stock had been sold and was being sold to the public at ten cents a share; whether or not this was done through a high pressure campaign seems irrelevant. There is also evidence that the owners of certain land accepted as consideration for certain oil leases granted the company, two and one half shares of stock per acre in addition to royalties from any oil that might be found. It is clear, furthermore, that the company is now carrying on development work, and has the same chance of striking oil that it had at any time when the stock was sold to the public. Finally, the fact that the Securities Commission lifted the suspension order which had for a while prevented the company's sale of stock shows that the company is a going concern. It does not seem unreasonable, in the light of all this evidence of dealing in the stock, to take the selling price of the stock as evidence of its market value.

CONCLUSION

In conclusion, the Industrial Commission respectfully submits that the circumstances surrounding the performance of services by the solicitors are similar to the factual situation that existed in the case of *Globe Grain & Milling Company v. Industrial Commission of Utah, et al., supra*. Any difference in fact between the two cases is one which arises out of a greater hedging in by the Northern Oil Company of activities by the solicitors.

We, therefore, contend that the services performed by the solicitors must be determined to be services "in employment", and that the decision of the Industrial Commission should be affirmed.

Respectfully submitted,

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