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Osman Home Improvement; United Staffing;
Credit General Insurance v. The Industrial
Commission of Utah; Unisured Employers' Fund;
Arnulfo Steven Sosa; Enrique Sosa : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 970406-CA

OSMAN HOME IMPROVEMENT;
UNITED STAFFING; CREDIT
GENERAL INSURANCE,

Petitioners,

Case No. 970406-CA

vs.

Priority Number 7

THE INDUSTRIAL COMMISSION
OF UTAH; UNINSURED
EMPLOYERS' FUND; ARNULFO
STEVEN SOSA; ENRIQUE SOSA,

Respondents.

Industrial Commission Case No.
951041

REPLY BRIEF OF PETITIONERS

PETITION FOR REVIEW FROM THE INDUSTRIAL COMMISSION OF
UTAH

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INTRODUCTION

The Petitioners submit this reply brief to address the points raised by the Respondents regarding the appropriate standard of review and the relationship between Enrique and Steven Sosa.

POINT I

THIS COURT SHOULD REVIEW THE COMMISSION'S DECISION UNDER A CORRECTION OF ERROR STANDARD.

The Uninsured Employers Fund and its parent, the Labor Commission, argue that you should review the Commission's decision in favor of the Uninsured Employers Fund under a "reasonableness" standard. You should disregard their siren call because the Utah Supreme Court indicates that the inquiry is more rigorous.

In Drake vs. Industrial Commission, 317 Utah Adv. Rep 3 (Utah 1997), the Supreme Court decided that for a mixed question applying the law to the facts, the Agency is not entitled to automatic deference (as it would be if the issue were purely factual), nor is the court entitled to freely substitute its judgment for that of the agency (as it would be if the issue were one of law). Instead, the Court stated that when it reviews how an agency applies the law to the facts, it

will review the issue with varying degrees of strictness.

The Petitioners ask the Court of Appeals to determine whether a given set of facts comes within the reach of a given rule of law. Ibid. That is, under the facts of this case, was Enrique Sosa his nephew's employer?

In Drake, the agency identified three factors in its analysis of the appropriate standard of review of mixed questions of law and fact. They were: (1) the degree to which the issue is fact sensitive; (2) whether there is a body of cases in which the courts have decided similar issues and, thus, provided guidance to the agency; and (3) whether policy considerations compel heightened scrutiny.

The issue of the relationship between employers and employees is, of course, fact sensitive. However, the facts in this case are not complicated and mere fact sensitivity does not vouchsafe unfettered discretion to the Labor Commission.

There is a wealth of cases from this Court and from the Supreme Court interpreting the liability of multiple employers for an injured employee's industrial injuries. See, for example, Kinne vs. Industrial Commission, 609 P.

2d 926 (Utah 1980), Gheri vs. Salazar, 883 P. 2d 1352 (Utah 1994), and BB & B Transportation vs. Industrial Commission, 893 P. 2d 611 (Utah App. 1995).

As the court noted succinctly in BB & B, if the court finds sufficient mixed control, both the actual employer and the statutory employer are liable for workers compensation benefits. The Commission in this case simply ignored (and, continues to ignore) the control exercised by Enrique Sosa. It clearly has forgotten the clear lessons of Kinne and its descendants.

There is also a policy consideration which compels you to apply a less deferential standard in this case as you review the Labor Commission's decision absolving the Uninsured Employers Fund of liability. There is an immediately apparent conflict of interest. The Uninsured Employers Fund operates under the aegis and control of the Labor Commission. While the statutory arrangement by which the Commission decides if one of its divisions is liable for benefits is legal, it certainly presents the appearance of impropriety. Accordingly, protection of the public's confidence and faith in the system of impartial administration of the Workers Compensation Act dictates that there be some meaningful review of the Commission's orders absolving its Fund of liability. That review should

approach a correction of error standard.

Further, this Court should understand that the Commission which overruled its administrative law judge did not observe the witnesses who testified in this case. The administrative law judge performed that function. One of the rationales for granting deference to a trial court is that the trial judge is the person before whom the parties and witnesses appear and before whom the evidence is presented. State vs. Pena, 869 P.2d 932 (Utah 1994). Where, as here, the Labor Commission overturns its administrative law judge, that rationale fails. There is little reason to give deference to the Commission's decision.

POINT II

THE RESPONDENTS FAIL TO ADDRESS THE EVIDENCE AND THE FINDINGS WHICH CLEARLY SHOW THAT ENRIQUE SOSA EXERCISED AN EMPLOYERS' CONTROL OVER STEVE SOSA.

One has to admire the consistency of the Uninsured Employers Fund/Labor Commission. Their brief exactly duplicates the error contained in the Order Granting Motion for Review. Both the brief and the Order focus on the right of control of Osman Home Improvement while ignoring the control exercised by Enrique Sosa, Steve Sosa's uninsured employer. Of course, they

have to overlook that control because if they acknowledge it, they run smack into Kinne vs. Industrial Commission, 609 P.2d 926 (Utah 1980) and BB & B Transportation vs. Industrial Commission, 893 P.2d 611 (Utah App. 1995), which clearly hold that where two entities retain the right to control an employee's labors, they are both liable for compensation and benefits under the Workers Compensation Act.

Recall that Enrique Sosa, the uninsured employer, determined how much Steve was to earn, set Steve's hours of employment, directed Steve's labors, furnished all of the expensive equipment which Steve used to perform his work, and who stood to make money from the Steve's labors. Demonstrating admirable *chutzpah*, the UEF/Commission steadfastly asserts that Osman Home Improvement "retained complete control over Steven's work" and was, therefore, his sole employer. In light of the facts of this case, that conclusion is ineluctably wrong.

Both the Petitioners and the UEF/Labor Commission recognize that the test of whether a person is another's employer is whether the would-be-employer retains a right to control the employee's labors. Kinne, supra. Factors that

weigh in that determination 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 fee, as compared to payment for a complete job or project; and (4) the furnishing of the equipment." Harry L. Young & Sons, Inc. vs. Ashton, 538 P.2d 316, 318 (Utah 1975). Enrique Sosa's relationship with Steve Sosa meets those criteria. Under the Workers Compensation Act Enrique was, therefore, Steve's employer.

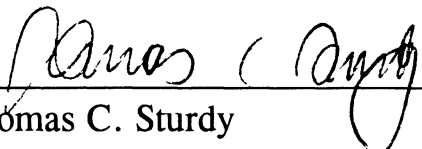
CONCLUSION

The Court of Appeals should review the Commission's Order Granting Motion for Review with something approaching a correction of error standard. There is a well developed body of law regarding the liability of multiple employers under the Workers Compensation Act. For policy reasons, the conflict of interest inherent in the Labor Commission deciding the liability of one of the funds which it administers, and the fact that the Commission did not hear the evidence or observe the witnesses militates for close scrutiny of the Commission's decision. Finally, the UEF/Labor Commission have not addressed

the very real control which Enrique Sosa exercised over his employee, Steve Sosa. You should review the Commission's Order Granting Motion for Review under a correction of error standard, determine that Enrique Sosa bears responsibility under the Workers Compensation Act for Steve Sosa's injuries, and reverse the decision of the Labor Commission.

Respectfully submitted this 17th day of December, 1997.

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CERTIFICATE OF SERVICE

I certify that I mailed two true and correct copies of the Petitioner's Reply Brief, on December 17, 1997, to each of the following:

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