2001

Harry L. Young and Sons, INC. v. The Industrial Commission of Utah, and Dennis A. Ashton : Brief of Petitioner

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

HARRY L. YOUNG & SONS, INC.,
Plaintiff,

-vs-

THE INDUSTRIAL COMMISSION
OF UTAH, and
DENNIS A. ASHTON,
Defendants.

Case No. 13866

DEFENDANT'S BRIEF

Answer to Petition for Writ of Review of Final Order of the Industrial Commission of Utah awarding benefits to Defendant

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Smith v. Alfred Brown Co.
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Sutton v. Industrial Commission
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Section 35-1-42 Utah Code Annotated 1953 9,10,11,12
Section 35-1-62 Utah Code Annotated 1953 9

AUTHORITIES CITED

Arthur Larson, The Law of Workmens Compensation 4,5,6

IN THE SUPREME COURT

OF THE STATE OF UTAH

HARRY L. YOUNG & SONS, INC.,)
Plaintiff,)

-vs- Case No. 13866

THE INDUSTRIAL COMMISSION)
OF UTAH and
DENNIS ASHTON,)
Defendants.)

DEFENDANTS' BRIEF

DEFENDANTS' STATEMENT OF FACTS

Plaintiff's "Statement of Facts" is substantially correct as to the facts therein stated but Defendants wish to make the following modifications to it.

The lease of the Kenworth tractor (R.189,Exhibit 7) must include the finding that the registered owner of the vehicle was at all times H.L. Young and Sons, Inc. (R.203,Exhibit 20). Oversize permits listed H.L. Young and Sons, Inc. as registered owner (R.195,Exhibit 13). Overweight permits listed the same ownership (R.196,Exhibit 14). The discussions regarding the lease of the truck took place in the offices of H.L. Young and Sons, Inc. with one Woody Snider (R.46,47). The repair of truck 2150 was with the approval of Mr. Snider (R.48). Mr.

Snider represented himself to be a representative of Inland Transport, Inc., (R.49), Mr. Snider was the representative of Intermountain Accounting Corporation and signed the Agreement to Maintain a Reserve Account (R.50,190,Exhibit 8). Mr. Snider was designated as the individual to act under the Power of Attorney authorizing the deposit of defendant's money to the reserve account (R.199,Exhibit 16). It was necessary for defendant to obtain approval from Snider prior to taking out any load for H.L. Young and Sons, Inc. (R.147). Snider advised as to the number of miles defendant should drive each month (R.148). Defendant was advised to take an overload or take no load at all (R.155). Plaintiff fined defendant $15.00 for exceeding the speed limit (R.194). Defendant was required to make check point calls in accordance with trip plans (R.192,Exhibit 10; R.193,Exhibit 11) and testimony in support thereof (R.115 to R.120).

ARGUMENT

POINT I

ASHTON WAS NOT AN INDEPENDENT CONTRACTOR AND WAS, IN FACT, AN EMPLOYEE OF YOUNG FOR WORKMENS COMPENSATION PURPOSES.

In reviewing all of the evidence, it must be born in mind that the separate corporations of Inland Transport, Inc., Intermountain Accounting Corp. and H.L. Young and Sons, Inc. were at all times represented by the same individual - E.D.

Snider. Inland Transport never established that it actually owned by title or registration truck 2150. At all times Young was the registered owner and its representative - Snider - was at all times acting essentially for Young.

The evidence is clear that at best the separate corporations were established as paper companies to avoid at all costs the establishment of an employment relationship with Young by the defendant. It seems obvious that the lease should have run from the owner, Young, to the lessee, Ashton. The assignment of revenue should have run from Young to the accountant. The Power of Attorney should have designated the accounting company as the holder of the power to handle the money.

The record seems to be very clear that there was some reason for what was being done. The obvious answer was to avoid employment.

At midpoint in the evedentiary hearing the commissioner granted a motion to dismiss as to both Inland Transport, Inc. and Intermountain Accounting Corp. on the obvious grounds that neither was in any position to control directly or indirectly the activities of Ashton (R.142). The record to that point and subsequent was very clear that Young not only had the right to control but, in fact, exercised the same. Defendant concurred in the dismissal.

Arthur Larson in his definitive work - The Law of Workmens Compensation - at paragraph 44.0 writes as follows:

> "44. Contractor Distinction: Right to Control Details. 44.00 The traditional test of the employer-employee relation is the right of the employer to control the details of the work. It is the ultimate right of control, under the agreement with the employee, not the overt exercise of that right, which is decisive. If the right of control of the details goes no farther than is necessary to ensure a satisfactory end result, it does not establish employment. The principal factors showing right of control are (1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire."

In category (1) above the record is replete with the actual exercise of direct control ranging from pre-employment tests (R.185,Exhibit 3, R.208,Exhibit 23),to the fine (R.194),to approval to take out a load (R.147),to the number of miles to drive (R.148) and all of the other details required by Snider.

In category (2) the record shows that Young agreed to pay Ashton on a mileage basis of .33 per mile less incurred expenses (R.144). This method is nothing more than piece work.

With respect to item (3) the furnishing of equipment, the record is very clear that at all times material the truck was not only owned but registered in the name of Young. There is no evidence of either ownership or registration in the name of Inland, the purported lessor. The equipment was Young's. All the trailers were registered in the name

of Young (R.99) and Young would be responsible for the contents. The I C C authority was Young's.

In the matter of item (4) the right to fire, it is very evident that Snider had such a right as the agent of Young. He, in fact, exercised this right at the eventual termination of Ashton.

Larson at section 44.20 p.648 (The Law of Workmens Compensation) writes:

> "Similarly, if the control of a trucker goes no further than directions on where to pick up or put down the load, this is usually held to be a part of the end result.
>
> But this idea of calling 'details' like speed and location a part of the end result cannot be pressed too far. The point at which the line must be drawn is aptly stated in the Barlion case relying on the Roth case:.....
>
> > The whole project involved many inter dependent details, the control of any one of which could not be surrendered without disorganization of the whole. (Pennsylvania Railroad v. Barlion, 172F 2d 710,711, and Pennsylvania Railroad v. Roth, 163F 2d 161)."

The case of Bowser v Industrial Accident Commission, 182 Ore. 42, 185 P 2d 891. classified as employees log truckers who owned their own trucks and were paid by the quantity of logs carried.

In the Utah case of Sutton v Industrial Commission 9U 2d 339, 344 P 2d 538, the defendant contended that the claimant was an employee of an independent contractor.

This was rejected by the court which said in part:

> "While the elements of control by the employer and the intent of the parties are the most important ones, none of the factors separately is controlling."

With respect to method of payment Professor Larson states at section 44.33(b) -

> "Payment on a completed project basis is indicative of independent contractor status. Payment on a piece work or commission basis is consistent with either status....The majority of modern decisions awarding compensation give little weight to the fact that a trucker, cutter or loader is compensated at so much per thousand feet of logs or lumber, per tie, per ton of stone, per yard of gravel, or per load mile....

Larson states further at section 44.34 -

> "When the employer furnishes valuable equipment the relationship is almost invariably that of employment. When the employee furnishes such equipment, this circumstance may, if coupled with other factors, indicate independent contractorship, but in itself it is not necessarily fatal to a showing of employment based on other grounds.... From this rationale it also follows that control may be realistically inferred even when the employer owns only a part of the equipment, if that part is of considerable size and value. For example, it is becomming quite common for employers to own fleets of trailers, and to contract with owner-drivers of tractors to haul the trailers. In cases involving this arrangement the trailer owners have been held to be employers, apparently on the theory stated above, that the trailer-owner presumably would have to reserve the right to control the way his trailer was handled. (James v McDonald, 73 S.D. 78, 39 N.W. 2d 478; Calvert v Industrial Comm. 55 Ohio L. Abs. 407, 90 N.E. 2d 424)"....

Inspite of these arguments, there is a growing tendency to classify owner-drivers of trucks as employees when they perform continuous service which

in an integral part of the employer's business."

The plaintiff's position is that Ashton was the owner of the tractor. Conceding, for purposes of argument that this is true, the record is also clear that Young owned and controlled the trailer and contents. (R.99). On Professor Larson's theory, Young had the greater interest in the equipment being used and of necessity to protect that interest was required to exercise a great deal of control. As an example Young had a speed limit 5 miles per hour less than the highway posted speed limit (R.69, Exhibit 12). Obviously, the speed restrictions, the check points, the call ins, everything that Young did was prudent and correct to assure the proper handling of Young's equipment.

Plaintiff has cited Gallegos v. Stringham 21U 2d 139, 442 P 2d 31 and the contents thereof are clear in establishing that, in fact, an employer-employee relationship did exist. This court pointed out the elements of control necessary to establish the relationship.

> "Defendant was told when to speed his trips and when to back up to the traxcavator and when to drive away, and he could not haul dirt in any other manner than as he was told."
>
> * * * *
>
> If the driver of the truck failed to maintain his position in line, the foreman of Gibbons and Reed could stop the truck from hauling."

Further the court explained:

> "Because Gibbons and Reed paid ten dollars per hour for the use of the truck, including the driver, it could not afford to let the driver determine the amount of work to be done. Such a rate of pay justified and made necessary the control of the movement of the truck by the company."

In the light of these facts, the court concluded that an employer-employee relationship had been demonstrated.

It is interesting to relate this to the case at bar. The first portion deals with the details of the work - markedly similar to the details described by Ashton as to what Young required. The second quoted section details the right of the employer to terminate - virtually the same right exercised by Snider as agent of Young. And the third dealing with compensation at a high rate which included the equipment - not substantially different than the .33 cents per mile paid by Young.

Defendant agrees that Luker Sand and Gravel v. Industrial Commission 82 U 188, 23 P 2d 225 and Kinder v. Industrial Commission 106 U 448, 150 P 2d 109 are controlling cases generally in the area of the exercise of control and the right to control. One can quote extensively from each and distinguish and compare all three with Gallegos and reach an entirely different conclusion than that reached by defendant.

POINT II

ASSUMING ASHTON WAS AN INDEPENDENT CONTRACTOR, ASHTON IS NEVERTHELESS ENTITLED TO WORKMENS COMPENSATION BENEFITS BECAUSE HE IS IN THE SAME EMPLOYMENT AS YOUNG AND IS A STATUTORY EMPLOYEE

For purposes of argument only and without conceding that Ashton was not an employee, let us assume that Ashton was an "independent contractor" as claimed by plaintiff.

Section 35-1-42 U.C.A. 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 subcontractors, shall be deemed, within the meaning of this section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. The term "independent contractor", as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work and is subordinate to the employer only in effecting a result in accordance with the employer's design."

Section 35-1-62, U.C.A. 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 <u>not in the same employment</u>, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal

representative may also have an action for damages against such third persons..." (Underscoring added)

By the interpretation placed on these two sections this court has recently denied a number of third party suits involving subcontractors and their employees in actions brought against either the general contractor or other sub-contractors. The theory behind these cases seems to be that "the same employment" includes general contractors, sub-contractors and employees of sub-contractors. Smith v. Alfred Brown Co. 27 U 2d 155, 493 P 2d 994., Gallegos v. Stringham, 21 U 2d 139, 442 P 2d 31, Doyle v. Facilities, Inc., 29 U 2d 41, 504 P 2d 1006.

If section 35-1-42, supra, were paraphrased, it could be phrased as follows: Where any employer (Young) procures any work to be done (hauling trailers) by a contractor (Ashton) over whose work he (Young) retains supervision or control and such work is a part or process in the trade or business (transporting trailers) of the employer (Young) such contractor (Ashton) shall be deemed an employee of such original employer (Young).

The only elements necessary to establish the above relationship is to demonstrate that the employer has retained some supervision or control over the sub-contractor and that they are both engaged in the same trade or business. The record is full of instances of control

and supervision by Young. Such control is absolutely essential for the orderly operation of Young's business. It is likewise clear that Young's business was the same as Ashton - ie the transportation of trailers from place to place.

In Smith v Alfred Brown Co., supra, this court found that masonry work was apart or process of the trade or business of a building contractor, thus making masonry subcontractors' employee an employee of the general contractor under this section. It would appear logical that the sub-contractor himself is also an employee.

This situation is identical with the case at bar. Ashton as the sub-contractor under Young is in the same employment as Young. Plaintiff would not seriously contend that Ashton is so independent of Young that Ashton could sue Young as a third party tort claimant. If Young could not be held responsible as a negligent third party, then Ashton must be treated as being in the same employment as Young and, therefore, an employee.

Referring to the first part of Section 35-1-42, supra, it may be significant to cover the necessary elements to establish the relationship. There is no question but what Young is "an employer". Young in fact "procurred work to be done" by Ashton. The transportation of trailers is, in fact,"a part or process of the trade or business" of

Young. Young did in fact retain some "supervision or control" over the activities of Ashton. It necessarily follows that Ashton himself and "all persons employed by" Ashton and "all other sub-contractors under" Ashton are, in fact, statutory employees of Young.

The next sentence of Section 35-1-42, supra, defines what an independent contractor is. Please note the language "independent of the employer in all that pertains to the execution of the work." (Underscoring added). The additional language "is engaged only in the performance of a definite job or piece of work". The relationship between Young and Ashton was an ongoing thing not limited to one job or piece of work. And finally, "is subordinate to the employer only in effecting a result in accordance with the employers design." Even if the facts can be extended to this standard on behalf of Young, Young can still be held to be a statutory employer - if any right of supervision, direction or control is present.

CONCLUSION

The Industrial Commission's Findings of Fact should be affirmed and the Order issued thereon should be sustained that Ashton was either an employee of Young or as an independent contractor was a statutory employee of Young and as such is entitled to workmens compensation.

Respectfully submitted this 14th day of May, 1975.

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