1978

Blair Sorenson v. the Industrial Commission of Utah and Jeffery Lynn Nelson : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

* *

BLAIR SORENSON, :

Appellant, :

vs. :

THE INDUSTRIAL COMMISSION OF UTAH and JEFFERY LYNN NELSON, : Case No. 15916

Respondents. :

* *

BRIEF OF RESPONDENT

APPEAL FROM THE ORDER OF THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH

Joseph C. Foley, Administrative Law Judge

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BRIEF OF RESPONDENT

NATURE OF THE CASE

Respondent, Nelson sought benefits under the Workmen's Compensation Act for injuries he suffered in the course of his employment while painting one of Appellant's apartments.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The evidence was heard by Kenneth Rigtrup, Administrative Law Judge, on March 15, 1976. Pursuant to U.C.A. 35-1-77 the medical aspects of the case were referred to a medical panel. Before the Medical Panel Report had been completed Judge Rigtrup left the Commission and was replaced by Administrative Law Judge Joseph C. Foley. On April 14, 1978 after reviewing Judge Rigtrup's notes, the transcripts and the medical panel report, Judge Foley awarded compensation to the Respondent pursuant to the Workmen's Compensation Act. On April 26, 1978 Appellant filed a Motion for

Review. Upon receiving the Motion for Review, Judge Foley, in accordance with U.C.A. 35-1-82.53, referred the entire case to the Industrial Commission. The Commission pursuant to U.C.A. 35-1-82.54 reviewed the entire record including the file containing Judge Rigtrup's notes, the transcript of the record and the medical panel report. On June 19, 1978 the Commission adopted Judge Foley's Findings of Fact, Conclusions of Law and Order in their entirety and denied the Appellant's Motion for Review.

RELIEF SOUGHT ON APPEAL

The Respondent seeks to affirm the Findings and Order of the Industrial Commission.

STATEMENT OF FACTS

The general framework of Appellant's statement of fact is correct as far as it goes, but there are many important omissions particularly ommissions regarding the employment relationship between Appellant and Respondent and the nature of Respondent's disability. For this reason the facts concerning these events are restated so that one complete picture may be presented. Numbers in parenthesis refer to pages of record.

At all times pertinent to this case Appellant owned nine rental units in Salt Lake City located as follows:

Duplex
1126 - 1129 Princeton Avenue
Salt Lake City, Utah

Duplex
548 East 7th South
Salt Lake City, Utah

Fourplex
1144 East Fifth South
Salt Lake City, Utah

Duplex
1019 - 1921 East Lake Drive
Salt Lake City, Utah

House
1032 Downington Avenue
Salt Lake City, Utah

Fourplex
2303 Green
Salt Lake City, Utah

House
367 East 2100 South
Salt Lake City, Utah

House
819 West 1400 North
Salt Lake City, Utah

House
656 Hollywood Avenue
Salt Lake City, Utah

House
550 East 7th South
Salt Lake City, Utah (126,159,160,161)

During 1975 Appellant collected $28,794.00 from this network of rental properties and spent $22,683.00 maintaining and remodeling them. (161)

Appellant and Respondent met in February, 1975 when they were taking a class together at the University of Utah. Appellant discovered that Respondent could do carpenter work and offered him $4.00 an hour to repair, remodel and paint apartments. (28, 30, 36, 37, 70, 149) Between February and August of 1975 Respondent worked

for and with Appellant at several rental units. (29,37,38,43-48, 114, 115, 141) Appellant specifically designated the date, the place and how the work was to be performed. He also suggested how long the work should take. (34, 48, 96)

During the middle of August, 1975, Appellant and his wife, Mrs. Sorenson, assured Respondent that they had plenty of work for him on the rental units. Mrs. Sorenson also told Respondent he could expect about 40 hours work per month for an indefinite period of time and that they could afford to pay him about $160.00 per month. (31, 82, 92, 148, 154)

From the end of July, 1975 until August 29, 1975 the date of the accident, Appellant gave Respondent a series of specific instructions concerning the painting of the North and West sides of the fourplex located at 1144 East 5th South. (50,51, 89,149) Respondent was told that he must use a wire brush and scraper, both of which Appellant was to provide, to scrape and brush the woodwork and cinderblock surfaces of the walls. (50,51,89, 90,149) After he had done that he was to apply a coat of primer and then a final coat of paint using the ladders, brushes and paint to be supplied by the Appellant. (51,52,89) As was true in previous work Respondent had performed for Appellant, Respondent's wage was to be $4.00 per hour. (28,30,36,37,70,149)

Pursuant to Appellant's instructions, On August 27th, two days before the accident, Respondent worked six or seven hours scraping and brushing the North and West sides of the 1144 East 5th South duplex. (49,52) Thereafter, Appellant inspected the

the work that had been done and not being pleased with the results, instructed Respondent by telephone to do the job over. (52,53,54) In redoing the work he was to use a brush, soap and water. (52,53, 54,151)

On the 28th of August, the day before the accident, because Appellant had not provided the equipment he had promised, Respondent could not work. (53)

On the morning of the 29th of August Respondent received a telephone call from Appellant, who told him that his wife would give him the soap, bucket and the brushes if he would come over to his house.(53, 147, 151) During the telephone conversation Appellant repeated his instructions on how to prepare the cinderblock and woodwork by scrubbing with soap and water. (53, 54, 147, 151) Respondent was again told to prime the workwork with primer which Appellant had purchased and had stored away for use on this apartment. (53,54,147,151) In accordance with Appellant's instructions Respondent went to Appellant's home, got the bucket, the soap and the scrub brushes and returned to the apartments at 1144 East 5th South. Following Appellant's instructions he mixed the soap solution, climbed the ladder and started scrubbing the cinderblock. During the performance of the work Respondent fell and sustained the injuries herein complained of. (54-58)

ARGUMENT

POINT I.

THE EVIDENCE CLEARLY SUPPORTS THE COMMISSION'S FINDINGS THAT APPELLANT WAS AN EMPLOYER WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT.

The Appellant devoted a substantial amount of time managing his apartments. In order to conduct this business it was necessary for him to keep substantial records regarding his income, expenditures, labor performed, hours worked, and allocation of expenses to the rental units concerned. (126,161,166-168) He had a substantial amount invested in hand and power tools and equipment. (38,47,51,78) He worked on the apartments himself, hired and supervised other persons and procured the services of independent contractors as needed. (46,48,53,166)

The Utah Supreme Court has defined the term "Employer" within the meaning of Sec. 35-1-42 to be a term which is "broad enough to cover all employment relationships". Ortega vs. Salt Lake Wet Wash Laundry, 108 Utah 1, 156 P. 2d 885 (1945). This definition is in accordance with the basic purpose of the Act:

> "Construction of statutory definitions. The definition of "employer" contained in the compensation acts, or statements as to who shall be deemed employers, should be broadly or liberally construed, in order to effectuate the purpose of the legislation to afford compensation to an employee and his dependents, the intention of the legislature being gathered from a consideration of the whole act. The basic purpose of the act is the inclusion of employers, not their exclusion, and doubts of jurisdiction must be resolved in favor of inclusion rather than exclusion, ... 99 C.J.S. Workmen's Compensation Sec.

Appellant's rental operations were so extensive that it must be concluded that he was an employer within the meaning of the act.

Appellant relies on Sommerville vs. Industrial Commission, 113 Utah 504, 196 P. 2d 718 (1948) in support of his contention that his extensive rental operations are not a business and hence that he is not an employer within the meaning of the statute. The decision in Sommerville, however, is an exception to the general rule stated in the Ortega case and is to be confined narrowly to the facts of Sommerville. The narrow application of the holding in that case is indicated by the language of the Utah Supreme Court on Page 721 of the opinion. The Court said:

> "Our holding is limited to the facts of this case, i.e. that where a person owns one piece of real estate which he "rents out" to tenants, but does not either personally or by agent devote a substantial time to the oepration or management of such property, the owning and renting of such property does not constitute a business within the meaning of the workmen's compensation act." (Emphasis added) 196 P. 2d at 721

There is a substantial difference between the facts now before the court and the facts in the Sommerville case. For this reason Sommerville should not be controlling on the issues now before the court.

In Sommerville, a woman who owned a coffee shop also owned one other building which she rented out to a grocer. There was no evidence to show that she spent any more time in renting the building

than it took to receive and cash one check per month. She hired the plaintiff to perform some minor repairs on the rented buildi and after showing him where the building was, did not visit the work site again until after the work was completed. She did not supervise the plaintiff in any way, nor did she furnish him with any tools. Thus, her time commitment was substantially less than that of the Appellant in this case.

The facts in this case are very similar to the facts in Davis vs. Industrial Commission, 297 Ill. 39, 130 N.E. 333 (1921). In Davis the defendant was a hardware and paint merchant but also owned a separate piece of rental property with 15 rental units. The two plaintiffs were employed by the defendant to clean the outside walls of the building in which the rental units were located. They were injured when the scaffold upon which they were standing gave way. The plaintiff's were awarded compensation by an arbitrator. The Industrial Commission and the Circuit Court affirmed the award of the arbitrator. Upon appeal the defendant claimed that he did not come within the provisions of the Workmen's Compensation Act because he was engaged in the hardware and paint business rather than in the business of maintaining the rental units. The Illinois Supreme Court held inter alia that defendant's activities in maintaining the rental property also constituted a business within the meaning of the Workmen's Compensation statute and affirmed the compensation award.

Appellant also asserts that because he claimed a loss on the apartments that he was not in business. This loss is theoretical because current real estate values are appreciating at a phenomenal rate rather than depreciating. Although for tax purposes Appellant claimed a loss of $4,273.00, in reality he made a tax free profit of $6,411.00, the difference between his gross income of $28,794.00 and his business expense of $22,383.00. (161) Because of this claimed tax loss, Appellant also saved tax on a substantial portion of his government employee's income. (158) Appellant reaped a substantial benefit from his apartment and home rental business.

The ownership and management of Appellant's apartments and houses constituted a business within the meaning of the Workmen's Compensation Act regardless of net profit or lack of profit.

In Larsen, Workmen's Compensation Law, (1973) Vol. 1A, Section 50.44 (a) the rule is stated as follows:

> On one point a fair degree of unanimity seems to have emerged in the absence of a "pecuinary-gain" requirement (Utah's Workmen's Compensation Statute has none) the concept of trade or business does not necessarily embrace the element of profit seeking . . . the test is not whether the employer is in business for profit, but whether he is in business at all. If he supplies a product or service it is immaterial what he does with his profit, or whether he expects or gets any profit at all. (Emphasis added)

POINT II.

THE GREAT WEIGHT OF THE EVIDENCE ESTABLISHES THAT RESPONDENT WAS AN EMPLOYEE AND NOT AN INDEPENDENT CONTRACTOR WITHIN THE MEANING OF U.C.A. 35-1-43.

A leading Utah case has enunciated the rule as follows:

> "When the employer retains supervision and control of the work to be performed, the workmen are employees." Rustler Lodge v. Industrial Commission, ___Utah___, 562 P. 2d 227, 228 (1977)

There was substantial evidence showing that Appellant retained control of every detail of the work to be performed by the Respondent. The clearest example of this is the way the Appellant supervised Respondent's painting of the 1144 East 5th South fourplex, the place where the Respondent was injured. Appellant told Respondent which sides to paint, where to begin, how to begin and what tools to use. (50,90) He furnished the Respondent with all of the hand tools, brushes, buckets, a ladder and paint. (52,89) He inspected the work. (52) He was not satisfied with the result after Respondent had scraped the walls with a scraper and wire brush and therefore directed him to rework surface with soap and water. At one point Respondent could not work because the Appellant did not have the equipment ready. Respondent worked for a wage of $4.00 per hour.

The following two cases are examples of how this Court has applied the law when the facts were virtually identical to the facts in this case.

In Rustler Lodge vs. Industrial Commission, ___Utah___, 562 P. 2d 227 (1977), Plaintiff, a skilled drywall applicator, was hired by the defendant, Rustler Lodge, to drywall a storage area and the ceiling of a conference room in the lodge. The lodge was engaged in the lodging and restaurant business. Plaintiff and defendant came to an agreement under the terms of which plaintiff was to furnish his own materials and his own special tools. Defendant was to furnish a protective drop cloth and a ladder and was to pay plaintiff at an hourly rate of $8.00 per hour. Plaintiff fell on a stairway while performing his services at the lodge and suffered injuries necessitating surgery. The Industrial Commission ruled that plaintiff was an employee of the defendant rather than an independent contractor. This Court affirmed, holding that the following factors were substantial evidence of control:

(1) The laborer was taken over the entire job and shown what service to perform.

(2) The employer furnished him a ladder and protective covering.

(3) The laborer was not allowed to commence work on his first appearance.

(4) He was paid an hourly wage. Ibid. at p. 229

It is also important to note in the Rustler case that this Court upheld the Commission's findings even though there were several facts, not present in this case, which militate against the finding of control. They are:

(1) The laborer was to work only once for the employer. He was merely to drywall a storage area and the ceiling of a conference room.

(2) He supplied all of the materials.

(3) He supplied all of his own special tools to perform the work except for a ladder and a protective covering. Ibid.

In Capitol Cleaners and Dyers vs. Industrial Commission, 85 Utah 295, 39 P. 2d 681, (1935) a painter was hired by a cleaning and dying establishment for the one-time task of painting a smoke-stack. The day after the painter began work he fell and was killed. The Supreme Court affirmed the decision of the Industrial Commission awarding compensation to the dependents of the painter. It held that the painter was an employee and not an independent contractor because:

(1) No estimate of cost or the time submitted to the cleaning company nor was any called for by that company.

(2) All of the laborer's equipment and supplies were furnished by the company.

(3) The laborer, a painter, was paid an hourly rate.

(4) In all respects except the actual mechanics of painting the work was to be done under the supervision and subject to the direction of the employer.

Appellant relies on Sommerville vs. Industrial Commission, 113 Utah 504, 196 P. 2d 718 (1948) in support of his argument that the Respondent in this case was an independent contractor. Sommerville is easily distinguished on the facts. In Sommerville the Appellant merely showed the Respondent what work she wanted done and left the manner and method of accomplishing the work up to the Respondent. After Appellant showed Respondent what she wanted done, she went back to the coffee shop. She never visited the site again until the work was completed. Ibid. at P. 750.

The facts are vastly different than in this case where the Appellant worked alongside Respondent, furnished all the tools and materials, and inspected the work and even made him redo certain tasks.

Appellant also contends that because Respondent received credit on the rent that he owed Appellant at a rate of $4.00 an hour that this was not consideration within the meaning of the Workmen's Compensation Act. In support of this argument Appellant cites Oberhansly vs. Travelers Insurance Company, 5 Utah 2d 15, 294 P. 2d 1093 (1956). The holding in the Oberhansly case is not

applicable to this case because in Oberhansly "there was no agreement to pay wages or salary." Ibid. at P. 1095. The Utah Supreme Court in the Oberhansly decision clarified the purpose of requiring consideration. It said:

> "The purpose of the act is to provide compensation for earning power, lost in industry, and the only basis for computing compensation is the earning ability of the employee in the particular employment out of which the loss arises. In short, the term "employee" indicates a person hired to work for wages as the employer may direct." (Emphasis added) Ibid.

In contrast, in this case there was a definite agreement between Appellant and Respondent for the payment of a wage or salary which was $4.00 per hour. The Commission used this agreed upon rate to compute the basis of the Respondent's earning ability. The fact that Respondent was to be given credit for his hourly earnings toward his rent does not change the employer-employee relationship. This specific designation fulfills the requirement called for in the Oberhansly case.

Black's Law Dictionary defines "wages" as:

> "Compensation given to a hired person for his or her services . . . Every form of remuneration payable for a given period to an individual for personal services including salaries . . . rent, housing, lodging . . . any other similar advantage received from the individual employer or directly with respect to work for him." Black's Law Dictionary, 4th Ed. Rev., p. 1750.

Thus, the compensation received by Respondent was consideration within the meaning of the Workmen's Compensation Act.

POINT III.

THE EVIDENCE SHOWS THAT RESPONDENT'S EMPLOYMENT WAS NOT CASUAL WITHIN THE MEANING OF THE ACT.

Appellant claims that Respondent's employment was casual within the meaning of U.C.A. 35-1-43. This court defined the meaning of "casual" in Utah Copper Company vs. Industrial Commission, 57 Utah 118, 193 P. 24 (1920). In that case a farmer was hired by the copper company at different times during the winter to repair an irrigation ditch that was used by the copper company for mining and milling purposes. After just three days of work the farmer received injuries which resulted in his death. The following language of the Supreme Court further describes the conditions of the farmer's employment.

> " . . . there was no regularity of employment . . . At the time of the employment of the deceased nothing was said as to the length of time that such employment would continue. It was understood that as soon as the necessary repairs were made upon the canal such employment would cease." Ibid at p. 29.

Despite the irregularity and uncertain duration of the farmer's employment with the copper company the Commission granted an award to his dependents. The District Court affirmed. The Supreme Court affirmed the District Court holding that employment was not casual if it was necessary to the furtherance of the employer's business. Since the copper company needed the water in the ditch for milling and mining purposes, the repairs to the ditch performed by the farmer were necessary to the enhancement or furtherance of the copper company's business. Thus, his employment was not casual within the meaning of the Utah Workmen's Compensation Act.

Respondent's efforts in repairing and painting enhance Appellant's apartment rental business. Respondent's work incre the rental value of the apartments, made them more attractive, easier to rent, and increased their rental life. In his treati on Workmen's Compensation Larsen deals with the issue of the repairman as follows:

> "Behind all these decisions lies one simple thought: Maintenance, repairs, painting, cleaning, and the like, are in the course of business because the business could not be carried on without them, and because they are an expectible, routine and inherent part of carryi on any enterprise." Larsen, Workmen's Compensation, (I Sec. 51.23

This Court in Capitol Cleaners and Dyers vs. Industrial Commission, 39 P. 2d 681 (1935), Supra, adopted the same ration In that case the Court held that the employment of a painter to paint a smokestack, although the job was of a one-time nature, nevertheless was not casual, because it was necessary to the accomplishment of the company's purposes and promoted its busin Ibid, at p. 681.

The conclusions based upon the facts in the order whic is the subject of this appeal are all within the requirements o the Utah cases cited herein. The Industrial Commission should affirmed if the fundamental purposes of the Workmen's Compensat Act are to be given effect.

POINT IV.

THE APPELLANT RECEIVED COMPLETE PROCEDURAL DUE PROCESS WHERE BEFORE RENDERING THEIR RESPECTIVE DECISIONS BOTH THE ADMINISTRATIVE LAW JUDGE, WHO ISSUED THE FINAL ORDER, AND THE INDUSTRIAL COMMISSION CAREFULLY REVIEWED THE FILE, THE MEDICAL PANEL REPORT, THE REPORTER'S TRANSCRIPT AND THE PRELIMINARY FINDINGS OF THE ADMINISTRATIVE LAW JUDGE WHO HEARD THE EVIDENCE.

The testimony of the witnesses in this case was carefully considered by Administrative Law Judge, Kenneth Rigtrup. After Judge Rigtrup heard the testimony in this case he resigned his position with the Industrial Commission to accept an appointment on the Public Service Commission. Thereafter, Judge Foley assumed responsiblity for the case. The Medical Panel Report was not received until after Judge Rigtrup had left the Industrial Commission. (266).

The record shows that upon taking over this case Judge Foley carefully examined the file, the transcript and the medical panel report. (309) The affidavit of Judge Foley, which supplements the record on appeal, makes it clear that the file contained Judge Rigtrup's mental impressions, preliminary findings and conclusions.

At Appellant's request, by way of Motion for Review, the Industrial Commission made a further perusal of all of the evidence. The record shows that pursuant to U.C.A. 35-1-82.53 and 35-1-82.54 the members of the Commission carefully examined the transcript, the medical panel report and the file which had been

prepared by Judge Rigtrup. (332) The Commission adopted Jud Foley's Findings of Fact and Conclusions of Law in their enti

The test to determine if requirements of due process have been met in an administrative proceeding is set forth in 16 A C.J.S. Constitutional Law, Sec. 628, as follows:

> "Procedural due process in administrative law is generally recognized to be a matter of greater flexibility than when dealing with strictly judicial tribunals . . . The cardinal test of the presence or absence of due process of law in an administrative proceeding is the presence or absence of rudiments of fair play long known to the law . . . "

The careful review by both the Administrative Law Jud and the Industrial Commission gave the Appellant due process a all the procedural safeguards required by law.

The Appellant relies heavily on Crow vs. Industrial Commission, 104 Utah 333, 140 P. 2d 321 (1943), to support his contention that he was denied procedural safeguards. In that case the circumstances were much different than those presentl before the court.

In the Crow case the record failed to show that the preliminary findings of the commissioner who heard the evidenc were available to the full commission that made the Findings o Fact and Conclusions of Law. Ibid. at P. 322. In this case, however, the record clearly shows that both Judge Foley and th Commission carefully reviewed the preliminary findings of Jud

Rigtrup, the transcript and the medical panel report. The review by the Commission of Judge Foley's findings and order pursuant to 35-1-85.53 and 35-82.54 was a procedure not available at the time the Crow case was decided. Therefore, that decision is not controlling of the issues in this case.

POINT V.

APPELLANT WAIVED HIS OBJECTION TO THE MEDICAL PANEL REPORT BY FAILING TO OBJECT WITHIN THE TIME PROVIDED BY LAW.

U.C.A. Sec. 35-1-77 provides that an employer may object to the findings of a medical panel within 15 days after that report is mailed to him. The statute further provides that if objections are not filed within the 15 day period the report is admitted in evidence and the Commission may base its findings on the report of the panel.

Appellant received the Medical Panel Report with written notice thereupon that he could object to the findings of the medical panel within fifteen days. Despite the written warning, Appellant made no objection to the findings of the medical panel. His objection is interposed for the first time upon appeal.

By not objecting in the manner provided by law Appellant waived his objection to the Medical Panel Report. The report then became the evidence of the case in regard to the extent and permanency of the Respondent's injuries. Utah Rules of Evidence,

Rule No. 4 provides that before a decision can be reversed or remanded because of the admission of certain evidence the Appellant must have interposed a timely and specifically state objection.

Appellant also appears to question the nature and ext of Respondent's injuries. The impartial Medical Panel Report clearly details the seriousness and extent of these injuries. Panel found that Respondent suffered severe injuries to his ri hip and right wrist as a result of the accident. His upper hi was broken into fragments which had to be fastened together by means of a metal compression screw. (267) His wrist was fractu in several places causing bone spurs to form and arthritis to set in. (267,268) As a result of those injuries, Respondent w unable to work for a period of six months after his accident. In December, 1976, it was necessary to have the compression sc surgically removed from Respondent's hip. (266) Shortly there Respondent required surgery upon his wrist because of the extr pain caused by slight movement. (267) The last operation was marginally successful and there remains a possibility of the n for additional surgery involving the total wrist. As his trau arthritis worsens, cortisone and pain killers will be required.

On the basis of the x-rays and a physical examination Medical Panel concluded that Respondent's percentage of perma physical impairment was a 10% loss of the upper extremeties o

6% loss of the whole man. None of these impairments were due to any prior injury. (268)

CONCLUSION

Because of the magnitude of Appellant's rental operations and the various jobs performed by Respondent on these properties, there is substantial evidence to support the Commissions findings that he was an employer within the meaning of the Workmen's Compensation Act. Moreover, Appellant's close supervision of Respondent, particularly at the 1144 E. 5th South apartments constitute substantial evidence of control and establish the fact that Respondent was an employee within the meaning of the act.

The Appellant received complete procedural due process where both the Administrative Law Judge, who issued the Findings and Order, and the Industrial Commission, carefully reviewed the transcript, the medical panel report and the preliminary findings of the Administrative Law Judge who heard the evidence.

The medical evidence clearly establishes that Respondent suffered severe, permanent injuries in the course of his employment. Appellant waived any objection he had to the introduction of the medical evidence by failing to object to the Panel Report.

The Order of the Industrial Commission should be affirmed.

Respectfully submitted,

KUNZ, KUNZ & HADLEY

BY: Russell J. Hadley
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MAILING CERTIFICATE

I hereby certify that I mailed two (2) copies, postag prepaid, of the foregoing Brief of Respondent to counsel for Appellant, Ronald F. Sysak, Prince, Yates & Geldzahler, 455 So Third East, Salt Lake City, Utah 84111, this 27th day of Septe 1978.

Lois Miller