1980

Glen M. Barney & Sons, Inc. v. Industrial Comm. Of Utah and Robert LaMar Jensen : Brief of Defendant

Utah Supreme Court

Robert J. Shaughnessy; M. David Eckersley; Frank V. Nelson; Attorneys for Defendant;
M. David Eckersley; Attorney for Plaintiffs;

IN THE SUPREME COURT OF THE STATE OF UTAH

GLEN M. BARNEY & SONS, INC., and the STATE INSURANCE FUND,

Plaintiffs,

v. Case No. 16020

THE INDUSTRIAL COMMISSION and ROBERT LAMAR JENSEN,

Defendants.

BRIEF OF DEFENDANT

M. David Eckersley
BLACK & MOORE
500 Ten Broadway Building
Salt Lake City, Utah
Attorney for Plaintiffs

Robert J. Shaughnessy
543 East 500 South, #4
Salt Lake City, Utah
Attorney for Defendant
Robert L. Jensen

Frank V. Nelson
Assistant Utah Attorney General
State Capitol Building
Salt Lake City, Utah
Attorney for Defendant
Industrial Commission

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

GLEN M. BARNEY & SONS, INC., and the STATE INSURANCE FUND, Plaintiffs,	:	
v.	:	Case No. 16020
THE INDUSTRIAL COMMISSION and ROBERT LAMAR JENSEN, Defendants.	:	

STATEMENT OF THE NATURE OF THE CASE

Robert LaMar Jensen filed a claim for compensation with the Industrial Commission of Utah on January 26, 1977, wherein he alleged he was injured by accident in the course and scope of his employment on October 20, 1976. In this application he alleged that at the time of his injury he was an employee, for compensation purposes, of both Chris Patton, doing business as Western Express, (hereinafter referred to as "Patton") and Glen M. Barney & Sons, Inc. (hereinafter referred to as "Barney"). Barney denied the existence of any employment relationship with the applicant at the time of his injury.

DIPOSITION BY THE INDUSTRIAL COMMISSION

Following a formal hearing before Administrative Law Judge Keith E. Sohm on May 12, 1977, an Order was entered finding joint liability on the part of Patton and Barney. The State

Insurance Fund, as compensation carrier for Barney, filed a timely Motion for Review of this Order with the Industrial Commission, which Motion was denied by a divided vote of the Commissioners, with the only law trained member of the Commission dissenting on the issue of Barney's liability.

RELIEF SOUGHT ON APPEAL

Defendant respectfully request that the Order of the Commission regarding the liability of Barney be affirmed.

FACTS

Defendant agrees with plaintiff's Statement of Facts but supplements the same with the following:

There were 22 trucks and 40 to 44 drivers of Patton. (R.52) Duane Branch was the immediate supervisor and only employee of Patton present other than drivers. Glen Barney or one of his employees at the loading site did the dispatching. (R.52) Bill of ladings were signed "Barney" and the truck number. (R.53) The bill of ladings listed "Glen M. Barney and Sons" as the carrier. (R.53) The signed tickets were returned to Barney at the weigh station. (R.53) Logs were made out in the name of "Western Express" but later were changed to list "Barney" as the carrier. All logs were turned into "Barney". It was under the direction of either the person running the loader or else Craig Barney that you received instruction and direction as to

when you loaded, and how and at what end of the pile. (R.56) Lining up to load was under the direction of Barney. (R.57) There is only one route to Page, Arizona and return. (R.76) A copy of the contract between Barney and Patton was in the truck at all times. (R.80) Jensen was instructed or understood that "whenever you're leased to a company, the person you are leased to is the boss and they do have control over the vehicle as long as it's leased to them." (R.99) Jensen understood that Mr. Barney had the vehicle under lease, and he was to take orders from him if he gave them. (R.99) Western Express, Inc. filed for bankruptcy on April 17, 1978. (R.149)

ARGUMENT

POINT I

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE COMMISSION'S FINDINGS OF A STATUTORY EMPLOYMENT RELATIONSHIP BETWEEN DEFENDANT AND PLAINTIFF UNDER THE PROVISIONS OF SECTION 35-1-42 (2) U.C.A.,1953, AS AMENDED.

Defendant concedes that plaintiff was not the common law employee of Barney. Defendant also will concede that under the provisions of Section 35-1-42 (2) U.C.A.,1953, in defining the ordinary and usual employment relationship,ie. "(2) Every... private corporation....having in service one or more workmen... under any contract of hire....oral or written," is an employer within the meaning of the Act, does not make defendant an employee.

Defendant contends that here the plaintiff was a statutory employer within the meaning of the last paragraph of the above statute. Section 35-1-42(2) U.C.A.,1953 provides in the final paragraph:

> "Where any employer procures any work to be done wholly or in part 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." (Emphasis added)

There is no question but what Barney is the "employer" who procured the work (transporting coal) to be done by a "contractor" (Patton) and that such work was a part or process of the trade or business of Barney. Barney was hauling coal under contract from Salina to Page, Arizona. There is also no dispute that the defendant was the employee of Patton. Therefore, if there be sufficient evidence to show that Barney had retained "supervision or control" over either Patton or defendant,

the defendant becomes the "employee of such original employer" (Barney) and is entitled to benefits from the plaintiff.

A review of the record shows the following:

Western Express had 40 to 44 truck drivers and 20 to 22 trucks with one supervisor on the job who was the only non-driver present. (R.52) Defendant testified on direct examination:

> "q. What was your understanding of the position of Duane Branch?
>
> a. He would be the immediate supervisor or the manager.
>
> q. Was there a dispatcher, or anyone else, that told the trucks when to go and come?
>
> a. No. It would be just at the loading site. It would either be Glen Barney or...(Further statement unaudible to the reporter)" (R.52)

And later defendant testified:

> "q. During the loading process, where did you load actually?
>
> a. At the railhead for Southern Utah Fuel, in Salina, Utah.
>
> q. Who told you how to get in and get out, and move around the loading area?
>
> a. It was either the person running the loader, or else Craig Barney was over there quite often directing it. So it would be under Southern Utah Fuel and Barney's direction as to when you loaded, and how and at what end of the pile.
>
> q. Was Mr. Branch ever over there?

a. Not very often

q. Now were there any specific instructions about the way in which you lined up?

a. Mainly to not, you know, get ahead of one of the other trucks. Such as going in line and loading in your turn." (R.56,57)

And finally defendant testified under re-cross examination -

"q. Mr. Jensen, you indicated earlier, when you were asked about your employer, you said: "I knew my direct employer was the owner of the truck." You knew, of course, that the truck was leased to Barney?

a. Yes, sir.

q. And were you under the impression--or instructed--that, since the vehicle was leased to Mr. Barney, that you were to take instructions from him as to using it, if he might give some.

a. Yes, sir. That is standard procedure. Whenever you are leased to a company, the person you're leased to is the boss. They do have control over the vehicle as long as it is leased to them.

q. And you understood then, when you went to work--I gather from Mr. Patton--that Mr. Barney had the vehicle under lease, and that you were to take orders from him if he gave them?

a. Yes, sir. That's standard knowledge on that.

---

q. You were also to take orders from Mr. Patton, and his supervisor there at the scene if they were given? Is that right?

a. Yes, sir. Or if Mr. Barney changed them, then we'd follow his directions too." (R.98,99)

It must be noted here that Mr. Glen Barney was present throughout the entire hearing, testified as to the identification of certain documents (R.105) but did not testify in contradiction to any of the testimony of the defendant. It is fair then to assume that the testimony of the defendant is not only uncontroverted but represents in fact both certain actions of direct control and implied control or the right to control details of the contractors work or that of his employees.

Defendant agrees that the form lease offered as an exhibit to establish the relationship between Barney and Patton was viable and important evidence. The lease also spelled out certain restrictions and limitations of liability to the parties. The contract also attempted to eliminate any possibility of the "CARRIER" being the employer of either the "OWNER" or the employees of the "OWNER".

In the case of Harry L. Young and Sons, Inc. v. Ashton, 538 P2d 316(1975), the same type of agreement was signed by Ashton (the owner-lessee) that Young was not the employer and Ashton fully understood that Young did not employ any drivers. In that case the court did not have any difficulty in sustaining the Commission's finding that Young was still the employer of Ashton. In the Young case the Commission was more concerned about the "exercise of control" or the "right to exercise

control".

This court has said in Bambrough v. Bethers, 552 P2d 1286,

> "In determining who is the employer of an employee, the right to control the employee's work is dispositive of the question; the degree of control actually exercised need not be great, so long as the right exists."

This court has ruled in a number of cases concerning third party liability under Section 35-1-62 U.C.A.,1953 that most employees of sub-contractors are considered to be "in the same employment" as the general contractor. (Emphasis added) Adamson v. Okland Construction Co., 29 U. 2d 286, 508 P2d 805 held that an employee of an electrical subcontractor could not sue the general contractor in tort liability because they were "in the same employment". (Emphasis added)

> Where the general contractors right to supervision or control over sub-contractor by supervising the over-all continuity and integration of work among various subcontractors, directing the sequence of the work by the subcontractors, making changes in the work done by them and ordering work stoppages" were considered sufficient.

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 not in the same employment, the injured employee or in the 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 person----". (Emphasis added)

In construing the critical phrase - "in the same employment" - this court in Smith v. Alfred Brown Co., 27 U. 2d 155, 493 P2d 994 had no difficulty in determining that masonry work was a part or process of the trade or business of a general contractor and that the general contractor exercised sufficient control to place the employees of the masonry sub-contractor "in the same employment" as the general contractor.

In Gallegos v. Stringham, 21 U 2d 139, 442 P2d 31, this court spelled out the elements of control by the general contractor - Gibbons and Reed.

> "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."

On these and certain other statements the court concluded that an employer-employee relationship existed between Gallegos and Gibbons and Reed - sufficient to deny an action based upon negligence by a third party sub-contractor.

In Sommerville v. Industrial Commission, 113 U 504, 196 P2d 718, the court affirmed that the crucial factor in determining whether or not an applicant for workmens compensation is an "employee" or an "independent contractor" is whether the

person for whom services were performed had the right to control the execution of the work. This was confirmed in the case of Christean v. Industrial Commission, 113 U 451, 196 P2d 502, refining the former by saying the "extent of control is the important test" in distinguishing between "employee" and "independent contractor".

In the earlier case of Parkinson v. Industrial Commission, 110 U. 309, 172 P2d 136, the court held that the "existence of a potential right to control is sufficient to create the relationship even though the right is never exercised."

Applying this concept of either "control in fact" or the "potential right to control" to the instant case, one is led to the conclusion that both elements were in fact present.

The court is directed to the uncontradicted testimony of the defendant that there was only one foreman or supervisor from Patton present for the 40 to 44 drivers, that directions were frequently if not mostly given by Barney or his employees, that directions to line up and depart were given by Barney, that Jensen understood Patton was his immediate employer but that he was to take orders from Barney when or if they were given and that all bills of lading, trip permits and paper work was in the name of Barney.

The conclusion appears inescapable that there was present under the working conditions at that time sufficient

exercise of control by Barney of the details of Patton's work and sufficient control or right to control the actual work of employees of Patton to make the defendant in this case either an "employee in fact" or a "statutory employee" and thus entitling the defendant to benefits from these plaintiffs.

CONCLUSION

The Commission's finding of statutory employment based upon Section 35-1-42(2) is amply supported by the record. Defendant has met the burden of establishing the presence, exercise and right to exercise control over both the activities of this defendant and his employer as well.

Dated this 23rd day of April, 1979.

ROBERT J. SHAUGHNESSY,
Attorney for Defendant Robert L. Jensen

CERTIFICATE OF MAILING

Mailed two (2) copies of the foregoing Brief of Defendant first class postage prepaid in envelopes addressed to: M. David Eckersley, Esq., 10 West Broadway Building, Suite 600, Salt Lake City, Utah 84101 and Frank V. Nelson, Esq., Assistant Attorney General, State Capitol Building, Salt Lake City, Utah 84114 this 23rd day of April, 1979.