

1951

The Commission of Finance of Utah et al v. The Industrial Commission of Utah et al : Plaintiffs' Brief

Utah Supreme Court

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7726

In the Supreme Court of the State of Utah

THE COMMISSION OF FINANCE OF
UTAH, administering THE STATE
INSURANCE FUND, and PARK
CITY CONSOLIDATED MINES
COMPANY, a corporation,

Plaintiffs,

VS.

THE INDUSTRIAL COMMISSION OF
UTAH, SAM E. WILLIAMS, and
SILVER KING COALITION MINES
COMPANY, a corporation, and CON-
TINENTAL CASUALTY COM-
PANY, a corporation,

Defendants.

Case No.
7726

PLAINTIFFS' BRIEF

FILED

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STATEMENT OF FACTS

On June 15, 1950 Sam E. Williams filed an application with the Industrial Commission of Utah, in which he claimed that he was entitled to benefits under the Utah

occupational disease law for silicosis complicated with tuberculosis. This application named the Park City Consolidated Mines Company as the employer and the State Insurance Fund as its compensation insurer. Later Mr. Williams filed another application with the Industrial Commission, in which he named the defendant, Silver King Coalition Mines Company as his employer and the defendant, Continental Casualty Company as its compensation insurance carrier. The Industrial Commission combined these applications into one case and held a hearing on April 25, 1951. In its decision of May 22, 1951 the commission dismissed the case as to Silver King and the Continental Casualty Company; and the commission held that the Park City Consolidated Mines Company and the State Insurance Fund were liable for payment of occupational disease benefits to the applicant. From that decision and the Industrial Commission's denial of an application for rehearing, the Plaintiffs have brought the matter to the Supreme Court for review.

The following periods of Mr. Williams' employment were stipulated at the hearing before the Industrial Commission. He worked as an employee of Park City Consolidated Mines Company from Jan. 1, 1934 to Oct. 3, 1942. Then he worked as an employee of Silver King Coalition Mines Company from Oct. 5, 1942 to Feb. 1, 1948. While he was still employed by the Silver King in 1946 he made a written agreement with the Park City Consolidated Mines Company to inspect that company's mine (R. 9 and 10), and he was paid \$50 for performing that work.

The following year while he was still employed by the Silver King he entered into another written contract with the Park City Consolidated Mines Company dated May 26, 1947, which is in evidence as Exhibit 4 (R. 84). In this agreement Mr. Williams agreed to retimber the shaft in the Park City Consolidated Mines Company's mine at Park City, "of 15 sets more or less." The Company agreed to furnish all of the materials. Mr. Williams agreed to furnish all of the labor, to pay all labor bills, to obtain waivers of labor liens and to do a job satisfactorily to the company. The company agreed to pay Mr. Williams the actual labor cost, plus 10%. There was no period of time specified in the agreement, within which the work should be performed or completed. Mr. Williams proceeded to perform the job he had contracted under this agreement, but he also continued to work as an employee at the Silver King mine until Feb. 1, 1948. Then he quit his job at the Silver King and from Feb. 1, 1948 until June 13, 1949 he devoted himself to the work at the Park City Consolidated.

In June 1949 Mr. Williams went to Colorado for the Park City Consolidated to work as a compressor man, this work continuing until December 1949. It was stipulated that his work in Colorado did not expose him to any silica dust (R. 28). From December 1949 until April 1950 he was in Utah, but was not working. In April and May, 1950 he worked for a period of 27 days for Park City Consolidated at Park City.

In its decision the Industrial Commission stated the issue as follows:

"Defendants, Park City Consolidated Mines Company and The State Insurance Fund, defend on

the ground that applicant was not exposed to harmful quantities of free silicon-dioxide dust sixty days or more *as an employee* of Park City Consolidated. There was no exposure in Colorado. The last employment in Utah was for a period of 27 days. Unless applicant was in fact an employee of Park City Consolidated for a sufficient number of days during 1948 and 1949 which added to the days of employment after his return from Colorado, would total 60 days or more, applicant's claim against defendant Park City Consolidated must be denied.

"The period in question is February 1, 1948 to June 13, 1949. Defendants Park City Consolidated and The State Insurance Fund contend that applicant was an independent contractor during that period and that his total exposure as an employee, if any, was only 27 days."

The Commission then made a finding and conclusion that the 1946 contract and the 1947 contract were independent contracts, but that Sam Williams' work under the terms of the 1947 contract was completed in April 1948. The Commission concluded that from April 1948 to June 13, 1949 Sam Williams was under the supervision and control of the Park City Consolidated Mines Company and therefore he was an "employee," and that he had more than 60 days exposure to silica dust in the employ of that Company.

On September 13, 1947 Sam Williams made a written application to the State Insurance Fund for a compensation insurance policy, in which application he designated himself as the employer and specified that he was applying for this policy as an "Individual," (as distinguished from a partnership or corporation) (Exhibit 2; R. 39 and 82).

The policy was issued to him effective that date and remained in force until June 13, 1949. During all of that period of time Mr. Williams made monthly payroll reports to the State Insurance Fund of the wages of the men he had working for him at the property of the Park City Consolidated, and he paid the Fund the premiums computed on the wages of all of those men for that period of one year and nine months. During that entire period Mr. Williams also made regular deductions from the men's wages and reported the wages and deductions for social security to the United States government and also to the Employment Security Division of the Industrial Commission (R. 40, 41, 45).

In making his payroll reports and premium payments to the State Insurance Fund, Williams did not include himself or pay any premium on himself. He had inquired at the office of the State Insurance Fund if he could be covered, and he was informed that the policy did not cover him for injuries he might have (R. 40 and 41).

ARGUMENT

POINT 1.

THE CONCLUSION OF THE INDUSTRIAL COMMISSION THAT THE CONTRACT ENTERED INTO BY THE APPLICANT AND PARK CITY CONSOLIDATED MINES GAVE RISE TO AN INDEPENDENT CONTRACTUAL RELATIONSHIP IS CORRECT.

The basis of the Commission's conclusion lies in the satisfaction of all the elements contained in Section 42-

1a-10 of the occupational disease law which defines "Independent Contractor":

"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."

The contract itself called for retimbering of 15 sets, more or less, to the satisfaction of the company. No right of supervision was reserved expressly to the company, nor was it inferred. The testimony of Mr. Kasteler, the company's representative at the site of the operations in question, indicates that he in fact exercised no supervision as to the detail of the work (R. 64 and 66).

Mr. Williams, the applicant, and his crew were engaged in replacing 15 sets of timber, more or less—a specific piece of work.

The contract reserved to Park City Consolidated only the right to determine whether the result was in accordance with its design.

Moreover, during the performance of the contract, Williams had the right to hire employees of his choosing

and had the right to fire them. He used his personally-owned time-books to record the hours his men worked for him. Periodically he submitted to the company a statement of the amount due him. The company thereupon paid him a lump-sum amount, based upon cost of labor plus 10%, a usual basis of payment for contracted work. See *Elizabeth J. Carleton v. Foundry and Machine Products Co.*, 199 Mich. 148, 165 N. W. 816.

In addition, Williams himself paid his employees. He secured an insurance policy with the State Insurance Fund, in which he signed an application and several payroll reports as an employer. He submitted in his own name, as an employer, social security and unemployment compensation reports directly to the Federal and State Agencies concerned therewith. He paid the taxes to these agencies, computed on the basis of the salary he paid his men.

POINT 2.

THE CONCLUSION OF THE INDUSTRIAL COMMISSION THAT UNTIL THE MONTH OF APRIL, 1948, WILLIAMS WAS AN INDEPENDENT CONTRACTOR IS CORRECT.

The 1947 contract between Williams and Park City Consolidated called for 15 sets of timbering, "more or less." Though the facts are somewhat obscure, it appears that the completion of the hanging of the 15 sets took place several months before April, 1948, which is the time when the complete retimbering of the shaft was accomplished, and the time when the Industrial Commission found that

Williams' status with respect to Park City Consolidated changed to that of an employee. After the hanging of the first 15 sets, at least 45 additional sets were installed.

Every element of an independent contractual relationship, as discussed under Point 1 of this brief, remained after the completion of the 1947 contract for retimbering the shaft. There is no evidence of any supervision in the placing of the 60 sets in the shaft. Williams testified that Kasteler decided "that further timbering should be done" (R. 60). In answer to the question as to who decided which sets should be replaced, the applicant stated: "Sometimes I did and sometimes Kasteler did. He told me to use my judgment on it and if they were rotten enough to take them out and replace them" (R. 60). This is hardly testimony evincing supervision over the details of the work. In the examination of the witness, Kasteler, no evidence of supervision as to detail nor of right of supervision is to be found.

POINT 3.

THE INDUSTRIAL COMMISSION'S CONCLUSION THAT THE STATUS OF SAM WILLIAMS FROM APRIL, 1948 TO JUNE 13, 1949 CHANGED TO THAT OF AN "EMPLOYEE" IS ERRONEOUS AND CONTRARY TO LAW.

The evidence throughout the entire record goes to the rehabilitation of the Park City Mine—to prepare for a resumption, at some later date, of mining operations. The only reasonable inference to be drawn from the applicant's continuing the work after the completion of the

1947 contract, was his agreement, in consideration of the receipt of the same benefits flowing from the 1947 contract, to perform definite and specific jobs, all parts of a larger undertaking, viz., the rehabilitation of the Park City Mine.

The record shows that after the retimbering of the shaft, the applicant and his men went on to perform other definite jobs. Specifically, to the extent that it can be determined from the record, these jobs were completed in the order stated: spiling the 'C' Drift, laying rails to the '930' raise, placing the compressor, laying pipe, retimbering the raise, disposing of wasterock, and finally, cross-cut and drifting operations. To sustain the conclusion of the Industrial Commission, in the light of Section 42-1a-10 of the Utah Code, the record of this case must contain substantial and competent evidence to show that the relationship of Sam E. Williams to Park City Consolidated changed so that the elements of an independent contractual status were no longer present. And to be substantial, the evidence must possess something of substantial and relevant consequence, and must not consist of vague, uncertain, or irrelevant matter not carrying the quality of proof or having fitness to induce conviction. *Milford Copper Co. of Utah et al. v. Industrial Commission et al.*, 61 Utah 37, 210 Pac. 993. And even though the facts used to support the conclusion may be found by inference, yet the inference must be a legitimate one. There must be a reasonable theory which leads to the conclusion reached. A finding cannot be predicated upon mere surmise or conjecture. *Aetna Life Insurance Co. v. Industrial Commission*, 64

Utah 415, 231 Pac. 442. However, if two inferences may be deduced from the evidence, one of which authorizes the award and the other not, and both inferences are equally reasonable, the Commission may not arbitrarily disregard one of the inferences and choose the other. In such circumstances the inferences meet and destroy each other, and neither has any probative force or effect. *Spring Canyon Coal Co. v. Industrial Commission*, 58 Utah 608, 201 Pac. 173.

The test of "control" has long been recognized as the most determinative one in the consideration of the relationship of the parties to the contract. The equivalent in the workmen's compensation law to Section 42-1a-10 has been construed by this court in several cases, in which it has been held that an independent contractor is one who is under contract to render service or do work for another according to his own method, means and manner of doing the work and without being subject to the control, direction or supervision of such other, except as to the result of the work or service. *Gogoff v. Industrial Commission*, 77 Utah 353, 296 P. 229; *Dayton v. Free*, 46 Utah 277, 148 Pac. 408. It is the right to control which is the most important test, and not control itself. *Luker Sand & Gravel Co. v. Industrial Commission*, 82 Utah 188, 23 P. (2d) 225. In the instant case there is no substantial evidence of a right to control reserved to Kasteler or to any other company representative from the time the contract of May, 1947 was completed to June 13, 1949. There is no express right nor can one reasonably be inferred from the conduct of the parties. The record shows that Kasteler's conduct

consisted of giving directions as to *what* was next to be done at the completion of a specific job; not *how* the job was to be done with respect to manner of performance of the details. If there were certain specifications he felt that Williams should meet, Kasteler would indicate them. For example, he designated the spots at which rails were to be laid. But such conduct on the part of Kasteler is no indication of a right to control essential details of the work. The mere fact that the company may have an overseer to see that the work is done to the satisfaction of the company, in his best judgment, does not change the character of the contract. *Hampton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776.

With respect to the spiling operation, Kasteler testified that after indicating what job he next wanted done, i.e., the spiling, Mr. Williams in his experience would supervise it (R. 68). With respect to the performance of the job involving the disposal of wasterock, the witness Kasteler was asked by applicant's attorney what *arrangement* he made with Williams about disposing of the wasterock. Mr. Kasteler answered that '*it was agreed*' that they would gob it in a particular place (R. 72). With respect to the retimbering of the raise, Kasteler was asked by applicant's attorney whether the retimbering was done at Kasteler's direction. Kasteler answered: "Yes, the *outline* of the work" (R. 70). All of this testimony on the part of Kasteler shows very clearly that he was not wielding control over the manner in which Williams performed, but rather was concerning himself with designating what the next specific job was to be. As it is so clearly stated in

the case of *Ludlow v. Industrial Commission*, 65 Utah 168, 235 P. 884, the status of an independent contractor is not affected by the mere fact that the employer may supervise and direct in matters necessary to a faithful performance of the contract.

Looking at the testimony of the applicant, there are only two instances in the record where he testified as to the manner of performing a specific job. He answer "Yes" to the question of his attorney as to whether he had any recollection of Kasteler's giving him orders as to the manner in which the wasterock was to be disposed of (R. 33). Even assuming that his answer went to the performance and not to the recollection, the testimony of Kasteler on cross examination shows that no control over performance existed. In answer to a question by counsel for the applicant: "Do you recall telling me that Mr. Williams was on his own?" Kasteler answer: "So far as supervision, yes. Sam was a good man" (R. 75). With respect to the cross-cut and drifting operations, Williams testified that he had no part in "*selecting* the manner of performing" the operation (R. 34). The testimony is vague, but assuming that the expression "selecting a manner of performing" means an adoption of one of two or more possible procedures to drive a drift, it nevertheless contains no evidence of actual control of the details of performance from which a right to such control may reasonably be inferred.

The record contains no substantial evidence of Williams' right to control his own men being assumed by the Company in the course of accomplishing the various specific jobs. Counsel for the applicant elicited much testi-

mony concerning the part-time departure of the Gordon brothers from William's crew, when the operations in the 930 raise were progressing. On direct examination, the witness, Kasteler, was asked whether there was any discussion with Williams as to "taking" the Gordon brothers out of his crew. Kasteler answered:

"Their situation was this, as I explained, they were going to start the raise, and I assumed that the Gordons spoke up and said it would be their inclination to get that raise on a contract, whether they could get a contract to drive that raise " (R. 71).

There is no evidence as to whether Williams was consulted about this matter or not. Without such evidence any inference drawn from the securing of the contract by the Gordons would not be legitimate so far as it related to the relationship between Williams and the company. A finding cannot be predicated upon mere surmise or conjecture. *Aetna Life Insurance Co. v. Industrial Commission*, supra.

Other important standards, with reference to which the status of the applicant may be measured, are stated in the case of *Parkinson v. Industrial Commission*, 110 Utah 309, 172 P. (2d) 136. Briefly the facts in that case were that Mr. Molyneaux was injured while he was preparing to haul a truck load of coke to the Woolsulate plant, which was operated by Parkinson. The Industrial Commission held a hearing, in which the evidence showed that Molyneaux had made an agreement with Parkinson to haul coke from two suppliers in Utah to the Woolsulate Plant and that he was to be paid a fixed amount per ton for each load he delivered at the plant. The plant's operations required a

minimum of 35 tons per week, but Molyneaux was allowed to haul all the coke he wanted to, within the capacity of the plant to store it. The Industrial Commission decided that Molyneaux was an "employee" because of the continuous character of the arrangements and the specified minimum amount of 35 tons. The Supreme Court reversed the Commission's decision and held that Molyneaux was an independent contractor. Among other elements of the contract, the Court mentioned that Molyneaux was not required to haul for Woolsulate exclusively and that he was free to choose the days on which he hauled the coke. The Court held that even though this contract was of a continuous character, that did not take it out of the category of a "definite job or piece of work."

This holding has particular applicability to the facts of our present case. Here, there was more than work of a continuous nature; this case involved the accomplishment of a series of individual projects, all of which were calculated to accomplish the larger undertaking of rehabilitating the Park City Mine.

In the course of the opinion of the Parkinson case, the court stated:

"The facts that the company could determine the place where the work was to be done and had a right to discharge Molyneaux at any time without contractual liability are not controlling. Anyone employing an independent contractor, such as a plumber or a building contractor, has the right to determine where he wants the work to be done. It is when the employer cannot only determine where the work shall be done but how it should be executed

that the relationship is that of employer-employee. The mere right to discharge without contractual liability is not sufficient control to make an employer-employee relationship though it is a factor to be considered with all the other pertinent facts and circumstances in determining that relationship."

Assuming a right on the part of either Williams or the company to discontinue the contractual relationship, in view of the nature of the work being done, i.e., a series of specific jobs, the principle above stated may be applied to the instant case, and so applied, it supports the conclusion that Williams was not an employee but an independent contractor.

Another principle laid down in the Parkinson case which provides an additional standard for evaluating the status of Williams is that the nature of the skill possessed by or the business engaged in by the workman is of vital consideration in determining whether the employer has the right to control the execution of his work. In our present case the record is instinct with recognition of the particular knowledge and skill of the applicant with respect to the work done in this case. As against this fact, there is evidence that the company had no one at the scene of the operations with knowledge comparable to that of the applicant. In answer to the question whether he was a mining engineer or geologist, Kasteler stated: "Well, yes, I might comment on that" (R. 64). When asked how much supervision Mr. Williams required, Kasteler replied: "None. The best way is to leave him alone because he had better knowledge than mine" (R. 65).

Finally, in the Parkinson case the court gave recognition to the fact that whenever the Industrial Commission passes on a jurisdictional question, the Supreme Court will examine the evidence to see whether it preponderates against the conclusions of the Commission. In other words the existence of "some" substantial evidence is not enough. The court said:

"As stated by this court in *Luker Sand & Gravel Co. v. Industrial Commission*, 82 Utah 188, 23 P. 2d 225, 229:

'Whether or not one engaged in a service for another is an employee or an independent contractor, within the meaning of the Industrial Commission Act, is a jurisdictional question, presenting a situation which requires this court to determine the status from the facts submitted from a preponderance of the evidence.'

It is submitted that a review of the legitimate facts contained in the record of this case will show that the Industrial Commission made its conclusion in the face of a preponderance of evidence which showed that none of the determinative elements of an employer-employee relationship were present.

There is no substantial evidence upon which an exclusive, reasonable or dominant inference can be based that in the performance of the work by Sam Williams, the right to control the details of the work shifted from him to Park City Consolidated.

POINT 4.

THE DOCTRINE OF ESTOPPEL SHOULD APPLY TO PREVENT SAM E. WILLIAMS FROM MAINTAINING A CLAIM FOR BENEFITS AGAINST PARK CITY CONSOLIDATED AND THE STATE INSURANCE FUND.

All of the necessary elements of estoppel exist in this case, to prevent Sam E. Williams from claiming benefits under the occupational disease law, against the Park City Consolidated Mines Company and the State Insurance Fund, for disability chargeable to the period from May 26, 1947 to June 13, 1949. In the written contract of May 1947 he agreed with Park City Consolidated Mines Company that he would do the work as an independent contractor. He applied to the State Insurance Fund on Sept. 13, 1947 as an "individual" employer and obtained a compensation policy to cover his employees in performing the work at the Park City Consolidated property at Park City. The Park City Consolidated Mines Company also had a policy in force at the same time Williams' policy was in force.

In signing the May 1947 contract it was the intention of both parties to make Williams an independent contractor. The intent of the parties is one of the important elements to be considered in arriving at a determination of whether the relationship of independent contractor or employee exists in a given case. *Christean vs. Industrial Commission*, 113 Utah 451, 196 Pac. (2nd) 502.

Mr. Williams continued to so represent his status to both the Park City Consolidated and the State Insurance

Fund by his reports and his actions during the entire year 1948 and in the following year until June 13, 1949, as we have heretofore pointed out in this brief. He made payroll reports and premium payments on the wages of his men each month until June 13, 1949 and then he requested the State Insurance Fund to cancel the policy (R. 40, 41 and 83). At no time during the period the policy was in force did he suggest to the State Insurance Fund that his status as an independent contractor had been changed. To the contrary, he inquired at the office of the Fund if he could be covered for injuries to himself. He was informed that he, as the employer and policy holder, could not be covered (R. 40). On January 10, 1949, when he had a serious accidental injury to his eye in the mine, he did not report it, because he understood that injuries to himself were not covered and he was not entitled to compensation benefits. That itself shows that his intent to be an independent contractor still continued until 1949.

Acting upon Williams' representations during the existence of his policy, the State Insurance Fund collected premiums from him on the wages of his employees; but no wages or income of Williams himself were reported to the Fund. So no premium was received by the Fund from either Williams, under his policy, or from the Park City Consolidated Mines Company under their policy, relating to the money Williams received from the Company for the period from May 26, 1947 to June 13, 1949.

POINT 5.

THERE IS NO EVIDENCE TO SUPPORT THE INDUSTRIAL COMMISSION'S FINDING THAT SAM E. WILLIAMS WAS EXPOSED TO HARMFUL QUANTITIES OF SILICON-DIOXIDE DUST SIXTY DAYS OR MORE WHILE WORKING FOR PARK CITY CONSOLIDATED MINES COMPANY IN 1948 AND 1949.

An examination of the record reveals the lack of any evidence relating to any exposure to silicon-dioxide (silica) dust at the Park City Consolidated Mines Company's property. It is true that the parties did not object to the medical panel's finding that Williams has disabling silicosis and tuberculosis (R. 25). Williams worked in the Silver King mine from October 5, 1942 to February 1, 1948. He probably was exposed to silica dust in that mine.

At the commencement of the hearing (R. 24 and 25), the presiding Commissioner said,

"I assume the parties are willing to stipulate that there is nothing material in this matter except the sixty-four dollar question as to who is liable, whether the Silver King Coalition Mines Company, the Continental Casualty Company, the State Insurance Fund, or the Park City Consolidated Mines Company? And that question involves the period of employment and the exposure."

Also during the preliminary part of the hearing (R. 28), Mr. Williams' attorney, Mr. Hurley, asked,

"Would the Defendants stipulate that in the employment during the period mentioned, while

working underground, he was exposed to silicon-dioxide dust in quantities sufficient to be harmful?"

Commissioner Wiesley then said,

"You don't need to stipulate that. He has got the disease."

At no other place in the evidence do we find any reference to harmful quantities of silicon-dioxide dust at the Park City Consolidated at Park City.

We maintain that it is claimant's burden to prove the exposure to silica dust for the necessary sixty day period in order to establish a legal basis for holding the last employer liable under the provisions of Section 42-1a-14 of the Occupational Disease Law. The presiding commissioner may have misled Mr. Williams' attorney by his expression that no proof or stipulation relating to exposure to silica dust, was necessary.

In neither the case of *Uta-Carbon Coal Company vs. Industrial Commission*, 104 Utah 567, 140 Pac. (2nd) 649, nor in the case of *Kennecott Copper Corp. vs. Industrial Commission*, 205 Pac. (2nd) 829, did the Utah Supreme Court hold that the fact that an employee has silicosis is sufficient to relieve him of the necessity of proving exposure to *some* silica dust while he was working for his last employer. In the case of *Pacific Employers Insurance Company vs. Industrial Commission*, 108 Utah 123, 157 Pac. (2nd) 800, the non-exposure to silica dust of a watchman of mining property was the determining factor which relieved the last insurance carrier of any liability in the case.

CONCLUSION

For the foregoing reasons, the award of the Industrial Commission against the Park City Consolidated Mines Company and The State Insurance Fund, should be annulled.

Respectfully submitted,

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