

1951

Plewe Construction Company et al v. Industrial Commission of Utah et al : Plaintiffs' Brief

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

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PLEWE CONSTRUCTION COM-
PANY, a corporation, and THE
STATE INSURANCE FUND,
Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, VERNAL ANDERSON,
BILL HUNT and JOHN MAR-
SHALL,
Defendants.

Clerk, Supreme Court, Utah

Case No.
7753

PLAINTIFFS' BRIEF

F. A. TROTTIER,
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STATEMENT OF FACTS

On February 13, 1951 Vernal Anderson filed an application with the Industrial Commission of Utah, in which he claimed that he was entitled to benefits under the

Workmen's Compensation Law for accidental injuries he sustained on January 11, 1951 at the construction site of the 13th Ward Chapel at 4th East and 1st South Streets in Salt Lake City. He made the application against the Plewe Construction Company, Bill Hunt and John Marshall. He alleged that there was a dispute as to whether the Plewe Construction Company or Bill Hunt and John Marshall were his employer at the time of his accident. The Plewe Construction Company had its workmen's compensation insurance in the State Insurance Fund. Bill Hunt and John Marshall did not have any workmen's compensation insurance on the date of Vernal Anderson's accident.

In its decision and order of June 20, 1951 the Industrial Commission adopted the Referee's recommended findings of fact and conclusions of law to the effect that

"Plewe Construction Company was an employer which procured shingling to be done in whole or in part for it by contractors or employees over whose work it retained supervision and control and that such work is a part and process of the general trade and business of Plewe Construction Company.

"The Referee therefore concludes that an order of the Commission should issue requiring defendants, Plewe Construction Company and the State Insurance Fund to pay all medical and hospital expenses reasonably incurred by applicant in the treatment of his injuries as aforesaid and compensation.

* * *."

Immediately preceding this quoted material the Referee gave his opinion that it was not necessary to find that Hunt and Marshall or Vernal Anderson, the injured man, were in fact employees of the construction company.

The Industrial Commission ordered "the defendants" to pay Anderson's medical expenses and compensation. It is not entirely clear whether the Commission meant that all four defendants should make these payments, and if so in what order or what proportion, inasmuch as Hunt and Marshall had no compensation insurance but Plewe Construction Company was insured by the State Insurance Fund.

On July 10, 1951 the Plewe Construction and the State Insurance Fund filed with the Industrial Commission an application for rehearing, which application was denied by the Commission on August 27, 1951. This certiorari proceeding is brought for the purpose of challenging the Commission's decision and order requiring Plewe Construction Company and the State Insurance Fund to pay any amounts relating to Vernal Anderson's injuries.

The following facts were brought out in the evidence at the Industrial Commission's hearing. Plewe Construction Company had the general contract for construction of the 13th Ward Chapel. Some time about December, 1950, Mr. Plewe, the president of this company, saw an advertisement in the Salt Lake Tribune which had been put in that paper by Hunt and Marshall. The advertisement read something like, "Roofs repaired" or "Leaky roofs fixed" (R. 40 and 52). The advertisement also contained John Marshall's telephone number. Mr. Plewe called that number on the phone and talked with Mr. Marshall. In that conversation and in a further conversation between Mr. Plewe, Mr. Marshall and Mr. Hunt the following day at the construction site, Hunt and Marshall assured Plewe that

they and other men whom they could procure were in a position to shingle the roof of the chapel right away. It was agreed that Hunt and Marshall would have the entire job of shingling the roof and they would be paid \$3.25 per square, a square being 100 square feet.

After Hunt and Marshall had been working alone on this shingling job awhile, Mr. Plewe said to them that the weather looked bad and he would like to have them get the other men they had mentioned in the beginning, so that the shingling job could be finished as soon as possible. Hunt and Marshall then put a want ad in the Salt Lake Tribune, reading something like, "Shinglers wanted," and giving Hunt's telephone number (R. 15 and 41). Anderson called Hunt on the telephone in the early morning of January 11, 1951 in response to the want ad. Hunt told him that if he wanted to do some shingling work he should meet him at 9:00 o'clock that morning at the 13th Ward chapel. Anderson went to the chapel and talked to Marshall, who had arrived there before Hunt did that morning. After awhile Hunt came and Hunt, Marshall and Anderson went up on the roof. First they swept off some snow. Mr. Plewe came shortly. He and they and two of his carpenters put up a tarpaulin over the roof where the shingling was to be done. Within a few minutes after Anderson started shingling, he fell off the roof and was injured.

ARGUMENT

POINT I

VERNAL ANDERSON WAS NOT AN EMPLOYEE OF PLEWE CONSTRUCTION COM-

PANY AND WAS NOT UNDER THAT COMPANY'S SUPERVISION OR CONTROL SO AS TO MAKE THAT COMPANY LIABLE FOR HIS ACCIDENTAL INJURY UNDER THE WORKMEN'S COMPENSATION LAW.

It is our contention that when Vernal Anderson received his accidental injury on January 11, 1951, he was an employee of Hunt and Marshall, who were in partnership as an independent contractor; and the Industrial Commission was in error in ordering anyone besides Hunt and Marshall to pay compensation benefits to Mr. Anderson.

There was not much substantial difference in the testimony of the witnesses before the Industrial Commission on matters of fact, but there was some divergence of their opinions on legal points. None of the four witnesses was a legal expert, so their legal opinions are not of much value. The main point on which the testimony of Mr. Hunt and Mr. Marshall differed was as to whether they were in partnership. Hunt testified that he did not consider that he and Marshall were partners; but Marshall testified that he considered that he and Hunt were in partnership on their shingling jobs (R. 40 and 53). Their testimony did not differ materially as to the arrangements which they had made. Hunt and Marshall first met in 1950 when they were each doing shingling work on different houses of a certain housing project. They became acquainted and then decided to take shingling jobs together. They had completed several jobs prior to the one they took on the 13th Ward Chapel.

Marshall's opinion that he and Hunt were in partnership was probably correct. Their arrangements were that they would each share equally on the jobs they took, regardless of the amount of work each one might do. This element of equal profits and losses is one of the most important in determining whether a partnership actually exists. In this connection, the letter which they sent to the Industrial Commission on March 5, 1951 over the signatures of both Hunt and Marshall is interesting (R. 3). It reads:

"We deny liability under the Utah Workmen's Compensation Act because Mr. Anderson was not our employee. His relationship to us was either partner or fellow employee of Plewe Construction Co."

With respect to the legal status of Hunt and Marshall in their relationship with the Plewe Construction Company on the 13th Ward chapel, Mr. Plewe testified that Hunt and Marshall took a subcontract for the shingling job, the company to furnish the shingles, and Hunt and Marshall to furnish the labor for applying the shingles at an agreed price of \$3.25 per square (R. 61 and 62).

Hunt and Marshall both testified that they did not think they were independent contractors. Of course, it would be in their interest to be held as employees of Plewe Construction Company insofar as Mr. Anderson's accident and injuries are concerned. If the construction company and the State Insurance Fund are required to pay Mr. Anderson's compensation benefits, it will relieve Hunt and Marshall of that financial obligation. Aside from their

monetary interest in the outcome of the case, the testimony of Mr. Hunt and Mr. Marshall shows the error of their lay opinion on the legal point in dispute in the case. Both of them indicated they thought that a party to a contract must furnish the materials as well as the labor in order to be constituted a subcontractor. We are not acquainted with any ruling of this Court which would uphold their legal conclusion on that point.

Mr. Anderson's attorney, throughout the hearing before the Industrial Commission, asked several questions of the witnesses relating to the "hiring" and the "wages" of Hunt and Marshall, apparently with the idea that if the witness said he was "hired" and received certain "wages," it would prove the existence of an employment relationship. Similarly he asked witnesses question about "supervision," "control," "instructions" and "directions" by the Plewe Construction Company and its agents. If the answers which the witnesses gave to these questions are analyzed, it can readily be seen that the instructions and directions and supervision and control by Plewe Construction Company were merely the specifications set forth orally by Mr. Plewe at the inception of the shingling contract. These specifications were that the shingles should be laid one-fourth inch apart and exposed to the weather $4\frac{1}{2}$ to 5 inches; lines should be drawn so that each row of shingles would be straight and even; and the wide shingles should be split before being nailed on, because if they were not so split the weather would split them.

The Referee's conclusion that the Plewe Construction Company retained supervision and control over the shingl-

ing job was based on an erroneous interpretation and application of the following provision found in Section 42-1-40 of the Workmen's Compensation Law:

"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."

In the same section, following the above quoted material is the further provision:

"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."

On several occasions this Court has held that the "supervision" and "control" mentioned in Section 42-1-40, means supervision and control over the manner or method of the performance of the work, in other words, "how" the contractor does the details of the work. In our present case,

the few specifications which were made at the commencement of Hunt and Marshall's shingling work were all aimed at "effecting a result in accordance with" Plewe Construction Company's design of having a good shingle roof installed on the building in accordance with the plans and specifications. Neither Herbert H. Plewe nor his brother exercised any supervision or control over the manner or method of Hunt and Marshall's shingling work. They did inspect the work for the purpose of determining whether the specifications were being complied with, that is whether the shingles were being laid $\frac{3}{4}$ ths of an inch apart and $4\frac{1}{2}$ to 5 inches to the weather, and whether the bottoms of the shingles in each row were in a straight line, and whether the wide shingles were being split before they were nailed on.

Nobody representing the Plewe Construction Company told Hunt or Marshall when they should commence work in the morning or how long they should work each day (R. 48). That shows one phase of their independence. Although Hunt and Marshall agreed in advance that they would get the shingling job finished as soon as possible, there was no date specified for the completion of the shingling job.

Nobody instructed Hunt and Marshall how they were to carry the bundles of shingles up the ladder or how many they should carry on each trip. They were not told how they should carry their tools or in what manner they should hammer the nails, whether by long strokes or short taps. So far as Hunt and Marshall were concerned, all that the

Plewe Construction Company's representatives were interested in was to have a well shingled roof on the building after Hunt and Marshall had completed their contract.

With respect to the tarpaulin on the roof, the Industrial Commission concluded that Mr. Plewe's offer and actions in putting up the tarpaulin for the purpose of keeping the roof dry was an evidence of supervision over the shinglers' work. The testimony is quite clear that Mr. Plewe offered to protect the roof and the shinglers from the inclement weather by means of the tarpaulin which belonged to the Plewe Construction Company. This was for the benefit of, and was an accommodation to, Hunt and Marshall and Vernal Anderson. Several men were needed to lift the tarpaulin to the desired position. After a conversation between Mr. Plewe and Mr. Marshall, (the words of which nobody seemed to remember), Plewe and some of his carpenters and Marshall and Anderson all assisted in installing the tarpaulin (R. 64).

A concise statement of the law point involved in this case is found in 58 American Jurisprudence, page 672, § 139:

"It is generally held that, for the purposes of workmen's compensation, an employee of a contractor or subcontractor is not to be considered an employee of the principal employer or contractor, in the absence of any provision to that effect."

Later in this brief we shall refer to some cases from states other than Utah and compare them to the case at

bar. But first we feel that it is more important to mention several cases in which the Supreme Court of Utah has rendered decisions interpreting and applying the section of our law relating to "supervision and control" and "independent contractors," which are controlling in our present case.

One of the most recent Utah cases involving the independent contractor relationship was *Sommerville vs. Ind. Comm.*, 113 Utah 504, 196 Pac. 2d 718, (decided Aug. 3, 1948). Sommerville was injured by an accident while he and his partner, Gardner, were doing some carpentry work on the gable end of a building owned by Ina Cook. The Court held that the preponderance of the evidence indicated that Sommerville was an independent contractor. In that case, as in the case at bar, the injured man was working on a job where he was using his own tools, but the materials were furnished or paid for by the one who procured the independent contractor to do the work. Sommerville and Gardner submitted their bill to Mrs. Cook and were paid for their work on the basis of \$1.50 per hour for the completed job. At page 509 of the Utah citation, the Court's opinion says:

"The preponderance of the evidence points to absence of right of control on the part of Mrs. Cook. She was interested only in the end result—that the repairs be accomplished. She was not interested in the manner in which plaintiff and Gardner accomplished this end."

The cases of *Christean vs. Ind. Comm.*, 113 Utah 451, 196 Pac. 2d 502, and *Stover Bedding Co. vs. Ind. Comm.*,

99 Utah 423, 107 Pac. 2d 1027, 134 A. L. R. 1006, which are cited in the Sommerville case, both dealt with the status of salesmen. The majority opinion in each case held that the salesman was an independent contractor, but the factual situation in those cases was not so similar to that in our present case as was the Sommerville case and the earlier one of *Parkinson vs. Ind. Comm.*, 110 Utah 309, 172 Pac. 2d 136. At page 311 of the Utah citation the Court's opinion contains the following:

"As stated by this court in *Luker Sand & Gravel Co. vs. Ind. Comm.*, 82 Utah 188, 23 Pac. 2d 225:

"Whether or not one engaged in a service for another is an employee or an independent contractor, within the meaning of the Industrial 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 * * *."

"Hence the determination of the question of whether Molyneaux was an employee within the meaning of the Workmen's Compensation Act will determine whether the Industrial Commission had jurisdiction of the case."

Briefly, the facts in the Parkinson 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. Molyneaux had made an agreement with Parkinson to haul coke from two suppliers in Utah to the Woolsulate plant at Midvale and he was to be paid a fixed amount per ton for each load. The plant's operations required a minimum of 35 ton 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," but the Supreme Court reversed the Commission 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 did the hauling. At page 315 of the Court's opinion is found the following language:

"We are of the opinion from all the facts and circumstances of this case that the company did not have the control of Molyneaux contemplated by the statute to make the relationship that of employer-employee. The facts that the company could determine the place where the work was to be done and had the 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 can not only determine where the work shall be done but how it should be executed that the relationship is that of employer-employee."

Ewer vs. Ind. Comm., 112 Utah 538, 189 Pac. 2d 959, is another recent case in which this Court held that a man was an independent contractor and not an employee, even though the materials, (sewer pipe), were furnished by the one with whom he contracted, and the independent contractor was to be paid for his services on a footage basis.

Included in the Industrial Commission's order denying the application for rehearing, (R. 78, 79 and 80), several citations were mentioned for the purpose of supporting the Commission's conclusions. We shall refer to that part of the order as the Commission's brief. Most of those citations are not applicable to our present case, because of the differences in the factual situations or in the statutory provisions involved. For example, the Commission's brief refers to 105 A. L. R. 580. That volume and page commences a discussion of several Louisiana cases. They mention that the Louisiana workmen's compensation law provides that any person, referred to in the section as principal, who should undertake to execute any work which is a part of his trade, business, occupation, or which he has contracted to perform, and who contracts with any person for the execution of the whole or any part of such work, should be liable for compensation to any employee engaged therein to the same extent that he would have been, had the employee been employed directly by him. The Louisiana provision does not require the existence of "supervision and control," as does the Utah statutory provision.

The Commission's brief (R. 79) also refers to the Connecticut case of *Bello vs. Notkins*, 124 Atl. 831, 101 Conn. 34, which deals with a statutory provision differing from Utah's. That case involved Section 5345 of the Connecticut workmen's compensation law:

"When any principal employer procures any work to be done, wholly or in part for him, by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process

in the trade or business of such principal employer, and is performed in, on or about premises under his control, then such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor."

At this point we would like to inform the Court that if the Utah workmen's compensation act had included a provision such as is found in the Louisiana and Connecticut laws above mentioned, we would have paid Vernal Anderson's claim and not brought the case to the Supreme Court for review.

The Arizona case of *Grabe vs. Ind. Comm.*, 38 Ariz. 322, 299 Pac. 1031, mentioned by the Commission, (R. 80), did involve a statutory provision practically the same as ours, but the factual situation was quite dissimilar to the case at bar. The original employer, A. C. Grabe, owned or leased a brickyard. He had covered all of the brickyard employees under a workmen's compensation policy, on which he paid premiums for more than three years prior to an accident suffered by a man named Castro. Grabe's policy expired just prior to Castro's accident. Grabe reported Castro's accident to the Arizona Industrial Commission on the usual form. At the Industrial Commission hearing, Grabe testified that he had contracted the making of bricks to Jose Romo and paid Romo at the rate of \$2.25 per thousand for bricks made. Romo hired the men he needed and paid them out of this money. The injured man, Castro, was one of the men Romo had hired. Grabe's own testimony at the hearing showed that he retained the right

of control over the "manner and method" of Romo's operations. Consequently Grabe was held liable for compensation benefits to Castro.

We have found two cases from states other than Utah, in which the injured party was a shingler.

Nollett vs. Holland Lumber Co., 4 N. W. 2d 554, was a Nebraska case decided in 1942. Number 6 of the syllabus briefly summarizes the case:

"Where decedent and another were employed as a team by a company engaged in the business of selling roofs, to apply roofing at a specified price per square and furnished their own tools and equipment without direction by company as to the manner of erecting scaffolding or attaching ladders so as to insure safety of the workmen, decedent was an "independent contractor" and not entitled to benefits under the workmen's compensation law."

Thompson vs. Braselton Federal Insulating & Building Materials Co., 223 Pac. 2d 527, was an Oklahoma case decided in 1950. Number 4 of the syllabus briefly summarizes the case:

"Where compensation claimant had been engaged in roofing work and took jobs where he found them, and hired his son and another to help repair dwelling on which claimant was injured, and claimant was paid at specified rate per square, claimant was an independent contractor, and fact that claimant had been requested to work on Labor Day, the day of his injury, so that alleged employer could weatherstrip next day, did not change his status so as to entitle him to compensation."

CONCLUSION

For the foregoing reasons, the award of the Industrial Commission against Plewe Construction and The State Insurance Fund should be annulled.

Respectfully submitted,

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