

1952

Plewe Construction Company et al v. Industrial Commission of Utah et al : Brief of Defendant Vernal Anderson

Utah Supreme Court

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PLEWE CONSTRUCTION COMPANY,
a corporation, and THE
STATE INSURANCE FUND.

Plaintiffs,

V.

Case No. 7753

THE INDUSTRIAL COMMISSION
OF UTAH, VERNAL ANDERSON,
BILL HUNT and JOHN MARSHALL.

Defendants,

BRIEF OF DEFENDANT VERNAL ANDERSON

FILED

JAN 22 1952 McCullough, Boyce & McCullough
Attorneys for Defendant

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PLEWE CONSTRUCTION COMPANY,
a corporation, and THE
STATE INSURANCE FUND,

Plaintiffs,

v.

Case No. 7753

THE INDUSTRIAL COMMISSION
OF UTAH, VERNAL ANDERSON,
BILL HUNT and JOHN MARSHALL,

Defendants,

BRIEF OF DEFENDANT VERNAL ANDERSON

STATEMENT OF FACTS

Plaintiffs have set forth in their Statement of Facts points which are not argued in their brief. It is concluded by defendant that these points are waived.

The facts as set forth by plaintiffs are rather sketchy and, since this case must turn principally upon the facts as elicited from

the testimony of the various witnesses, it is

necessary that a more detailed statement regarding various points be made.

With reference to the tarpaulin which was placed upon the roof in order that the shingling operation could be carried on, defendant Anderson testified as follows:

"Q. Was there anyone else that gave you instructions and supervised the work?

A. Mr. Plewe directed the roof along with the shingles, and he directed that they put a tarp over the roof so as to continue the shingling if the snow started." R. 13-14.

Defendant Anderson further testified:

"Q. You stated in your testimony that Mr. Plewe came up and supervised the placing of the tarp on the roof so you could go on shingling in inclement weather?

A. Yes.

Q. He came up and supervised the placing of that tarp?

A. Yes." R. 21.

The tarpaulin was a large one. Mr. Hunt,

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Mr. Marshall, defendant Anderson, Mr. Plewe, a

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couple of carpenters and Mr. Flewe's brother placed the tarp over the roof. The exact conversation that took place between Mr. Flewe and the group there present, with reference to the placing of the tarp on the roof, could not be remembered by any of the witnesses. However, it was the general opinion that when Mr. Flewe spoke, it was assumed he spoke to the group on the roof in directing them what to do. R. 21, 22, 53. It was Mr. Flewe who decided where and how the tarp should be placed. R. 24, 26.

With reference to the question of pay, defendant Anderson, when asked from whom he expected to receive his pay, answered, "from the Flewe Construction Company inasmuch as they were doing the job." R. 15.

Mr. Hunt, in testifying regarding the question of pay, stated as follows:

"Q. Were you going to pay Mr. Anderson yourself for this work or was he going to receive his pay from the Flewe Construction

A. He was to receive it through the Plewe Construction Company. The general understanding is that when a shingler goes and gets a job somewhere he may get help from somebody and he may get paid and then pay the other fellow, to save making out separate checks." R. 34.

Mr. Hunt testified in talking with Mr. Plewe that it was his understanding they were to be paid \$3.25 per square, this being the prevailing wage for shinglers. R. 32, 38. They did not furnish any material such as shingles, nails, etc. The only things furnished by them were labor and tools. R. 32. The defendant Anderson was to receive exactly the same wage as Mr. Hunt and Mr. Marshall, i.e., \$3.25 per square. About halfway through the job Mr. Hunt and Mr. Marshall asked Mr. Plewe for more moeny and he agreed to pay them \$3.50 per square, an increase of 25¢ per square. R. 34.

Mr. Marshall, in testifying as to how he came to be working on the construction project,

answered as follows:

"A. We had an ad in the paper, "Leaky Roofs Fixed," and Mr. Flewe called up and said he would like us to work on the Church, so I said that me and my partner would go down and look at it. I told him it would be \$3.25 a square, but my partner would have to look at it." R. 52.

With reference to the question of partnership, if one existed, Mr. Marshall testified as follows:

"Q. Did you consider yourself as a partnership, as a legal entity; did you divide your earnings?

A. Yes.

Q. Had Mr. Hunt done twice as much work as you did, would you divide equally?

A. We do the same work if two works on the same job and they divide it.

Q. It is more convenient to work together than alone?

A. Yes, and less dangerous." R. 53.

Mr. Hunt, with reference to this question of partnership, testified as follows:

"Q. Let's go back just a moment. You and Mr. Marshall were in partnership, were you not, in the shingling business?

A. No.

Q. How did you and Mr. Marshall get together?

A. I met Mr. Marshall on a construction job.

Q. You both worked on construction jobs prior to this?

A. Yes.

Q. How did you happen to get into the shingling work?

A. I was working with another old fellow at the time, and Mr. Marshall was doing a house on the same project, and we got together and decided we could work better together and faster than working alone, so we took other houses on the same project, and both of us worked on them." R. 40.

Mr. Hunt and Mr. Marshall had done some shingling prior to the time defendant Anderson came on the job. Mr. Hunt, in testifying regarding this situation, stated:

"A. It was wintertime, and a lot of snow, and the general contractor on the building wanted it completed as soon as possible, so he instructed us, that is me and John Marshall, to get all the help we possibly could on the roof to get it done as quickly as possible.

Q. Then it was in pursuance of those instructions you placed that ad in the paper?

A. We wanted to get more men on the job, so I placed it." R. 30, 41.

There was no particular time that the shingling was to be done. Regarding this question, Mr. Hunt testified as follows:

"Q. In this particular instance did you have any agreement with Mr. Plewe with reference to the time during which you would be shingling?

Q. As a matter of fact, during what time would you shingle this job?

A. When the weather permitted." R. 47.

(R. 50, 51)

"Q. Now isn't it a fact, Mr. Hunt, that as a practical matter you shinglers work whenever the weather permits, and you don't go up there when it is snowing, for fear of falling off and breaking your neck? You shingle when it is safe to do so?

A. Yes.

Q. And you shingle on Saturdays and Sundays as well?

A. Yes."

The evidence as to the method and manner of applying the shingles on the roof is, of necessity, rather limited. However, the instructions that were received were given by Mr. Plewe and Mr. Plewe's brother to Mr. Hunt, Mr. Marshall and Mr. Anderson. R. 36.

Mr. Hunt testified in this regard as follows:

"A. Yes. the substance of the conversation

was Mr. Plewe wanted us to be sure to put the shingles on a certain width.

Q. What was that width?

A. A quarter of an inch apart, that is.

Q. A quarter of an inch apart?

A. Yes." R. 36, 37.

Mr. Hunt testified further as follows:

"Q. Did you receive any more instructions from Mr. Plewe about how the shingles were to be put on, except what you have stated, the space to be a quarter of an inch? Did you receive any additional instructions or were any additional specifications made by Mr. Plewe as to the way the job was to be done besides that?

A. Yes.

Q. What was it, the conversation which involved additional instructions and specifications?

A. Mr. Plewe also said that we should split some of the wider shingles so we would not have too many of the wider shingles up

there, and to split the wider ones in half, and also to space the shingles five inches to the weather, and general outline.

* * * * *

Q. What about the kind of material?

A. Where to find the shingles.

Q. Where?

A. At a place on the ground, and the nails were up in the second story.

Q. Now that encompasses the whole conversation?

A. Not on the whole job, no.

Q. What else happened with respect to that?

A. Later, Mr. Plewe, a brother, I believe, came up on the roof and told us also that we were to split the shingles, and Mr. Plewe here instructed him to tell us to split the shingles, and principally to watch us to see that we did the job.

Q. One of the things that Mr. Plewe said to you was about splitting the shingles,

and his brother also came up and spoke about splitting the shingles?

A. Yes." R. 38, 39.

Mr. Marshall in testifying regarding the same matter stated that Mr. Plewe's brother was up there most of the time looking over the shingling work, etc. R. 53.

Mr. Hunt testified that it was Mr. Plewe's opinion that they should split the shingles and upon receiving such instructions, they split the shingles as required by Mr. Plewe. R. 45.

Mr. Hunt and Mr. Marshall did not shingle the entire roof. They shingled approximately 85% of the roof, at which time further work had to be done before any further shingling could be accomplished. R. 44, 45, 49. Mr. Hunt in regard to this testified as follows:

"Q. What was the reason you didn't come back and finish the job?

A. Mr. Plewe paid us off in full for what shingling we had already done.

Q. And he didn't call you back to do any more?

A. That is right." R. 45.

Besides Mr. Hunt and Mr. Marshall, Mr. Plewe and two carpenters also shingled on the roof. R. 51. This was a project of the L.D.S. Church and "donation labor" was used. One man was furnished by the Church who also did shingling on the roof. However, as testified to by Mr. Marshall and Mr. Plewe, the shingling this man put on had to be removed as he had started at the wrong corner. R. 59.

Mr. Hunt testified he did not consider himself an independent contractor within his understanding of that term. R. 40, 48, 49, 52. Mr. Marshall also testified that he did not consider himself a shingling contractor and as far as Mr. Marshall could remember there was nothing in his conversation with Mr. Plewe concerning the word sub-contractor. R. 54.

Mr. Plewe testified that he was present

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duri construction of

the job and watched the shingling being done. R. 69, 70. Mr. Plewe testified that all their sub-contracts were written and that such contracts refer to the general specifications, etc. However, Mr. Plewe further testified that there was no written contract with Mr. Hunt or Mr. Marshall. Mr. Plewe further testified that with many of their sub-contractors with whom they dealt repeatedly, they did not have written contracts. There was nothing specifically in the record to indicate whether Mr. Hunt or Mr. Marshall had ever worked for Mr. Plewe prior to this occasion. However, the general understanding gained by reading the record is they had never worked for Mr. Plewe prior to this time. R. 67, 68, 71.

Mr. Plewe, with reference to the question of instructions to the shinglers, testified:

"Q. Did you give them any directions or instructions other than these specifications which have been heretofore mentioned as to the

general way in which the job was to be done?

A. Not particularly. They were both good mechanics and doing a good job." R. 67.

ARGUMENT

POINT I. DEFENDANT VERNAL ANDERSON WAS AN EMPLOYEE OF THE PLEWE CONSTRUCTION COMPANY AS DEFINED IN THAT PORTION OF SECTION 42-1-40, UTAH CODE ANNOTATED, 1943, WHICH READS AS FOLLOWS:

"Where an 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 sub-contractors under him, and all persons employed by any such sub-contractors, shall be deemed, within the meaning of this section, employees of such original employer."

In order for a person to qualify as an employee under this section of the Code and to be eligible for compensation from the original employer, two requirements must be met, (1) the original employer must retain supervision or control over the work of the contractor and (2) the work must be a part or process in

contractor defined in the latter part of the section."

Further the court states:

"The test of the statute having been met, it is not controlling that Franklin was paid by way of commission instead of a salary or wage, that he received part of the commission paid to James, or that he may have been employed or might be discharged without the consent of the company having first been obtained, or that the truck he used did not belong to the company. Eng-Skell Co. v. Ind. Acc. Com., 44 Cal. App. 210, 186 P. 163. The statute provided that, where the stated conditions exist, the contractor, his employees or subcontractors 'shall be deemed within the meaning of this Section, employees of such original employer.' The statutory provision which we have quoted has practically no vitality, unless it is applicable to a situation such as disclosed by the record in this case."

(See also Grabe v. Ind. Com. 38 Arizona 322, 299 P. 1031).

There is little argument that shingling is a part or process in the business of general contracting. Plaintiffs' main objection, as set forth in their argument, is that defendant Vernal Anderson was not an employee because he or Mr. Hunt or Mr. Marshall were not under the supervision or control of Plewe Construction Company. If this section means what it says,

and as it has been construed by this Court in Utah Fire Clay Co. v. Industrial Commission (supra), it is apparent that where the original employer retains supervision or control over the work of the contractor that the employees of said contractor are covered under the terms of the Workmen's Compensation Act.

In defining the terms "supervision" and "control" this Court has stressed the right to control, as the factor that governs, and not whether that right is exercised. (See Commission of Finance of Utah, Administrator of the State Insurance Fund, et al, vs. Industrial Commission of Utah, No. 7726, dated January 4, 1952, and cases cited in concurring opinion of Justice Wolfe).

Plaintiffs stress the point that defendant Vernal Anderson was working for an independent contractor and that there was no retention of supervision or control. In the case of PARKINSON ET AL, VS. INDUSTRIAL COMMISSION, 110 Utah 309, 313, 172 P. 2d 136, the court in an opinion by Mr. Justice Wolfe, in construing Section 42-1-40,

Utah Code Annotated, 1943, had this to say:

"From these definitions it is apparent that whether a workman is an "employee" or an "independent contractor" is dependent on (1) whether the employer has the right to control his execution of the work, (2) whether the work done or to be done is a part or process in the trade or business of the employer, and (3) whether the work done or to be done is a definite job or piece of work."

This Court has on numerous occasions had before it questions regarding this point of the right to control the execution of the work and the particular meaning to be ascribed to it. However, after reading a good number of the cases involved, in addition to the ones cited by plaintiffs in their brief, it is defendant's position, and I am sure it is concurred in by this Court, that each case must stand or fall on its own facts; that any one particular element cannot conclusively determine whether the right to control the execution of the work exists or not, but rather, if collectively the various factors lend to the conclusion that this man is an employee because his employer can tell him how to do the work, the manner in which it is to

be performed and controls the employee's actions except as to those things where the exercise of supervision or control would be pointless. (See *Christean, et al, v. Ind. Com.* 113 Utah 451, 196 P. 2d 502). Justice Wolfe in his very excellent discourse entitled "Determination of Employer-Employee Relationships in Social Legislation" Columbia Law Review, June 1941, had this to say:

"At an earlier period when judges were considering situations in which it was necessary to determine which of two persons was the master of the tortious actor, they never considered that from their sensible solutions of the practical problems involved there would emerge a doctrine which was to be used as a device to change an employee's legal relationships merely by subtracting the right of control over means and methods. They never conceived that by losing sight of the real basis of their decisions, a salesman or a truck driver or a negro cotton-picker, in continuous daily labor for a single employer, would be excluded from employee status by terming his work an independent calling, created by an employer expressly foregoing the right of control over details where supervision was, in any event, impracticable or impossible.

"The 'right of control' test, used as a mere rule of thumb and divorced from the factual situations from which it originated, would permit a master to convert his

long-time cook, who had become familiar with the master's gustatory inclinations, into an independent contractor by agreeing to relinquish his right of control over the manner of his cooking or the menus to be served. This perversion of the doctrine of independent contractorship was unforeseen even in the tort field. The astonishment of the common law judges would have been great if they had known how attempts would be made to use the doctrine as a device to escape, not only the severe rule of respondeat superior, but also the statutory obligations imposed, regardless of tort, by a later society."

Defendant has set forth in his Statement of Facts those points which he feels lend to the necessary conclusion that Flewe Construction Company retained supervision and control over Mr. Hunt and Mr. Marshall and defendant Anderson as well. There is a definite limitation as to the amount of control and supervision which can be exercised in the shingling operation. The following is a summary of the details set forth in defendant's Statement of Facts:

Mr. Flewe decided that a tarpaulin should be laid over the roof and he instructed Mr. Hunt and Mr. Marshall and a couple of carpenters to place that tarp and how it should be placed.

With reference to the question of payment,

the defendant Anderson was to receive exactly the same pay, i.e., \$3.25 per square, as Mr. Hunt and Mr. Marshall, whom plaintiffs contend were independent contractors sub-contracting the job under the Flewe Construction Company. Further, with reference to the question of pay, about halfway through the job Mr. Hunt and Mr. Marshall asked for an increase and Mr. Flewe granted them an increase to \$3.50 per square, which conclusion would hardly lend itself to the construction that these men had a contract for a definite job or a piece of work.

Plaintiffs in their brief have stressed the point that Mr. Hunt and Mr. Marshall were in partnership and for that reason defendant Anderson would not be covered under the provisions of the Workmen's Compensation Act. Whether that be true or not is immaterial, but it should be noted that Mr. Hunt testified that he was not in partnership with Mr. Marshall. Mr. Marshall testified they were in partnership merely because it was more convenient to work together and less dangerous. It is very unlikely

the plaintiffs could construe a legal entity from such a statement.

After Mr. Hunt and Mr. Marshall had done some shingling, they were instructed by Mr. Plewe to get more men on the job and, as a result, an ad was placed in the paper to which defendant Anderson responded. Mr. Hunt testified it was pursuant to those instructions that an ad was placed in the paper.

With reference to the question of when the shingling was to be done, there was no set time as to when Mr. Hunt or Mr. Marshall or defendant Anderson should shingle. Mr. Plewe's concern was to get the roof shingled at the earliest possible date. Mr. Hunt testified that as a practical matter shinglers work whenever the weather permits and if it is snowing they do not work for fear of injury; that they may shingle on Saturdays and Sundays as well.

As to the application of the shingles and the instructions that were given, both Mr. Plewe and Mr. Plewe's brother gave instructions

to the following effect: That the shingles were to be put on at a certain width, a quarter of an inch apart. It was Mr. Plewe's opinion that the wider shingles should be split. Mr. Plewe's brother was present to see that this was done. The shingles were to be placed five inches to the weather.

The Plewe Construction Company furnished all the materials to be used in the shingling operation. Mr. Hunt, Mr. Marshall and defendant Anderson furnished only their labor and tools.

Mr. Plewe testified that he was present during the entire operation and, furthermore, Mr. Plewe's brother was present looking over the shingling of the roof.

Mr. Plewe decided that the last 15% of the shingling should be done by other than Mr. Hunt or Mr. Marshall.

Furthermore, Mr. Plewe himself shingled, so did two other carpenters and a third man who was furnished by the L.D.S. Church.

Plaintiffs, in their brief at page 9, have raised the point that 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. Furthermore, 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. Plaintiffs cite this as evidence of lack of control or supervision of Mr. Hunt and Mr. Marshall. Certainly if Mr. Hunt and Mr. Marshall were good mechanics, as evidently they were as testified to by Mr. Plewe, it would not be necessary to instruct them as to the length of their strokes, how they should carry their tools and the number of shingles they should carry up a ladder. Any lack of supervision or control regarding these factors would certainly be pointless and have no bearing on the ultimate question of employer-employee relationship. (See quotation from Columbia Law Review cited supra).

Mr. Plewe testified that all of their sub-contracts were written. However, it is specific in the record that Mr. Hunt and Mr. Marshall

had no written contract.

As stated in the Commission's decision dated August 27, 1951, "it would be difficult to imagine how company supervision over the shingling operation could have been any more complete, as it appeared that Mr. Hunt and Mr. Marshall complied with every direction and suggestion made by the company with reference to the work."

With reference to the third element which Justice Wolfe set forth in the Parkinson case as to whether the work done or to be done is a definite job or piece of work, there is this to be said. It is true that Mr. Hunt's and Mr. Marshall's job was limited to shingling, but, as has been previously stated, Mr. Hunt and Mr. Marshall were not the only ones who shingled on this job. Mr. Flewe, himself, shingled, two carpenters shingled, and some men furnished by the L.D.S. Church shingled.

This Court in the case of PARKINSON, ET AL, VS. INDUSTRIAL COMMISSION (*supra*) stated: (Utah

Reports - P. 316, 317)

"The test of a "definite job or piece of work" must be taken largely with the fact that such work is of the type that the workman did as part of his independent calling, i.e., his "own business." Certainly many employees do a definite job or piece of work. In fact any employee does that at a particular time. The definite job meant is something not usually done by the employer as part of his business but something he usually gets some outside party to do. The "definite job" test is really not helpful unless it is taken in connection with other factors or limited to jobs such as are usually done by outside parties in pursuance of their independent callings such as construction of buildings or some job not in the line of the employer's business but something which he finds necessary or desirable in the furtherance of his business."

The Industrial Commission has found from the factual evidence that defendant Vernal Anderson was an employee within that portion of Section 42-1-40 as quoted supra. The facts presented show the retention of the supervision and control which is necessary, and it is the defendant's contention that there is substantial evidence to support the Commission's findings. This court, in an opinion by Justice Henroid, in The Commission of Finance of Utah, et al, v. Indus

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Utah, et al, No. 7726,

filed January 4, 1952, had this to say:

"The last mentioned evidence lends much merit to plaintiff's contention that such facts point up an independent contract, and were this evidence not in conflict with that set out hereinabove which points up a master-servan relationship, we would feel constrained to upset the findings of the Commission. But we cannot choose between two sets of facts, both of which are substantial. Since there is substantial evidence in support of the findings, we are compelled to sustain the Commission, under Title 42-1-79, Utah Code Annotated, 1943, as amended, and the rule often enunciated by this Court as reflected in *Camacho v. Industrial Commission*, ___ Utah ___, 225 P. 2d 728, and cases therein cited."

Plaintiffs have cited in their brief a number of cases which support the general propositions of law which defendant relies upon. However, there can be no comparison between those cases and the case at bar in respect to the factual evidence. The gross dissimilarity of facts precludes one being a precedent for the other.

CONCLUSION

In conclusion it is respectfully submitted that the decision of the Commission should be sustained and that the Plaintiff Pleve Con-

struction Company and the State Insurance Fund
should be ordered to abide by the decision of
the Commission.

Respectfully submitted,

McCullough, Boyce & McCullough
Attorneys for Defendant