

1955

Milan D. Smith v. The Industrial Commission of Utah et al : Plaintiff's Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rex W. Hardy; Attorney for Plaintiff;

Recommended Citation

Reply Brief, *Smith v. Industrial Comm. Of Utah*, No. 8455 (Utah Supreme Court, 1955).
https://digitalcommons.law.byu.edu/uofu_sc1/2504

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECEIVED

MAY 5 1956

LAW LIBRARY
U. of U.

IN THE SUPREME COURT

of the

STATE OF UTAH

MILAN D. SMITH, for and on behalf
of KATHLEEN MAY SMITH and
MICHAEL JAY SMITH, minor
children of Roland B. Smith,
Deceased,

Plaintiff,

-vs.-

THE INDUSTRIAL COMMISSION
OF UTAH, SMITH CANNING
COMPANY, BOX ELDER PACK-
ING CORPORATION, SMITH
FROZEN FOODS, INC., and
NATIONAL SURETY COMPANY,

Defendants.

Case No. 8455

PLAINTIFF'S REPLY BRIEF

REX W. HAREY

Attorney for Plaintiff

TABLE OF CONTENTS

Page

POINT I. ALTHOUGH THE DECEASED WAS PRESIDENT OF SMITH FROZEN FOODS, INC., AND BOX ELDER PACKING CORPORATION, HE RECEIVED A SALARY FROM BOTH COMPANIES, NOT AS PRESIDENT, BUT AS GENERAL MANAGER AND WAS, THEREFORE, AN "EMPLOYEE" OF SAID CORPORATIONS AT THE TIME OF HIS DEATH, WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT.	1
POINT II. THE DEFENDANT, NATIONAL SURVIVOR COMPANY, HAVING RECEIVED PREMIUMS ON THE INSURANCE POLICY BASED UPON THE SALARY PAID TO THE DECEASED, IS ESTOPPED TO ASSERT THAT HE IS NOT AN EMPLOYEE WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT.	12
CONCLUSION	14

TABLE OF CASES

Bowne vs. S. W. Bowne Company, 221 NY 26, 116 NE. 364	9
Brown vs. Conway Electric Light & Power Co., 82 NH. 78, 129 Att. 633	10
Carville vs. A. F. Hornot & Co., 293 Pa. 104, 135 Atl. 652	11
Columbia Casualty Company v. Ind. Comm., 200 Wis. 8, 227 NW. 292	8 & 13
Cook vs. Millers Ind. Underwriters (Tex) 240 SW 535	5
Higgins vs. Bates Street Shirt Co., 129 ME. 6, 149 Atl. 247	10

Hirsch vs. Hirsch Brothers, (NH) 92 A2nd 402 (1952)	9
Jones vs. Planter's National Bank & Trust Co. (NC) 173 SE. 595	13
Kelpien vs. O'Donnell Lumber Co., et al., 230 NY. 301, 130 N.E. 301	10
Leigh Atchison, Inc., vs. Ind. Comm. 188 Wis. 218, 153 N.W. 806	7
Plain vs. National Mut. Cas. Co. (La) 28 So. 2nd. 680	12
Manfield & P. Co. vs. Manfield, 9 Ind. App. 70, 102 N.E. 539	11
Milwaukee Toy Company vs. Ind. Comm. (Wis) 234 NW 718	5
Stevens vs. Ind. Comm. (Ill.) 179 N.E. 102	9
Merich General Accident & Liability Ins. vs. Ind. Comm., 193 Wis. 32, 213 N.W. 630	7

POINT I

ALTHOUGH THE DECASED WAS PRESIDENT OF SMITH FROZEN FOODS, INC., AND BOX ELDER PACKING CORPORATION, HE RECEIVED A SALARY FROM BOTH COMPANIES, NOT AS PRESIDENT, BUT AS GENERAL MANAGER AND WAS, THEREFORE, AN "EMPLOYEE" OF SAID CORPORATIONS AT THE TIME OF HIS DEATH, WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT.

Point II of Defendants' Brief brings in the issue whether or not the decedent as president of the corporations was, at the time of death, an "employee" within the meaning of the Workman's Compensation Act. I feel that this issue is not before the court at this time, but is a matter to be decided by the Industrial Commission in the event the case is referred to them. However, I feel that a reply brief is in order since the issue has been raised.

There has been considerable controversy throughout the various states as to whether or not executive officers of a corporation as such are employees within the meaning of the various Workmen's Compensation Acts. There is, however, complete unanimity of the authorities to the effect that the mere fact an injured party is an executive officer will not preclude recovery if he is, in addition to his executive functions, performing services as an employee. This is very important in this case.

As will be later developed, I feel that under the existing law even if it could be decided that the deceased was strictly an executive officer and nothing more, he would still be entitled to the benefits of the Utah Workmen's Compensation Act; first, under the enlarged construction now placed on similar acts, and second, on the grounds of

estoppel. A careful check of Utah law fails to reveal any construction of the Act concerning inclusion of corporation executive officers.

The facts of this case when weighed against decisions throughout the United States would, in my opinion, clearly classify the deceased as an employee of the corporations and, therefore, the Applicants are entitled to the benefits of the Workmen's Compensation Act. I would like also to note at this point that New York, Washington and North Carolina have passed statutes expressly providing that corporate executive officers are covered by the Act unless they elect to the contrary, with the further provisions in Washington and North Carolina that the compensation paid be included in the payroll. Many other states have reached this same conclusion by construction. To obtain an insight into the present trend of Workmen's Compensation coverage, I would like to quote from the recent works of Larson on Workmen's Compensation, Sec. 54, page 764, as follows, parts of which are also included in Defendants' brief.

"Corporation officers who perform only executive functions are deemed excluded from almost all acts. But a person who can establish independently, on the basis of nature of the work done, method of payment, and subservience to the control of an employer, that he meets the tests of employment does not forfeit that status by occupying at the same time the status of corporate officer, director or stockholder."

And further, at Sec. 54.10 it goes on to say:

"The development of the law of compensation coverage has been colored at every point by a sort of unwritten preconception

of the typical claimant and typical industrial injury contemplated by this kind of legislation. The very words 'workman' and 'industrial injury' conjure up a mental picture of a man in overalls, in the midst of whirring machines, getting a clean-cut injury such as a broken arm as a result of some dramatic mishap. The early cases interpreting 'employee', 'accident', 'course of employment' and 'injury' did, as we have seen, at first seem inclined to confine the act to cases conforming to this popular notion of industrial injury.

"By 1948, matters had gradually progressed to a point where it was possible to take to the highest court of Massachusetts a claim for compensation filed by a corporation president who contracted a gastrointestinal illness in Mexico in the course of a trip taken for his health at corporation expense.

"True, compensation was ultimately denied, but not because of the disparity between this picture and that of the workmen in the factory--ie, no overalls, no smash up, no manual labor, no helpless wife and children, no empty pay envelope. The ground of denial was simply the personal character of the trip, since its only business aspect was the purchase of \$50.00 worth of goods for the corporation in Mexico.

"Anyone who has not followed the development of compensation law to this point, and whose picture of compensable injury remains that of the typical factory accident, is apt to be surprised at the extent to which compensation law has now put forth

its protecting arm over sedentary officials as well as sweating laborers, and made employees out of those whom their subordinates regard as bosses. Compensation acts could (and a very few do) deny their benefits to employees who earn more than a stated annual wage, or who hold executive office in a corporation. But the vast majority contain no such limitations. As a result, the courts have been free to adopt the view that compensation protection is designed for anyone who works for a living, since physical injury will probably ultimately affect earnings to some extent whether the injured person is a machine operator or a travelling vice-president promoting sales." (Emphasis added)

Also, at Sec. 54.21, page 787, it states:

"In addition, the vast majority of the cases have awarded compensation even when the employment duties were of a supervisory character, such as those of a general manager, superintendent of a department, foreman, or superintendent of construction, since these are all jobs that, in ordinary circumstances, would make the holder an employee." (Emphasis added.)

From these quotations it can be seen that to properly evaluate a case cited as precedence on either side in this case, three things should be considered:

1. the wording of the statute under which the case was decided;
2. the year in which the decision was rendered; and
3. the nature of the services performed

by the injured party at the time of the accident.

The more recent cases are inclined to grant coverage to all executive officers, although the only work they perform is in this capacity.

If this court chose to do so, it could adopt the reasoning used in the case of Milwaukee Toy Company vs. Industrial Commission (Wis) 234 Nw 748, where the court in construing a statute very similar to our own, made the following statement:

"It is of course fundamental that, to entitle an injured person or the dependants of a deceased person to compensation under the terms of the Compensation Act, the relation of employer and employee must exist. ***

"A corporation is by legal fiction a person and of course is 'another' under the terms of the Workmen's Compensation Statute.*** If *** applying the corporate fiction would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong, equitable claim, the fiction is disregarded ***. Although one individual owns all the stock, he does not thereby become the corporation. *** From the above it appears that the fiction of corporate entity is not to be lightly regarded."

We do not believe that Utah should adopt this liberal interpretation although there is considerable authority which would support the position. If you were to do so, however, there would be no need for further argument.

The Texas statute expressly excludes presidents, vice-presidents, secretaries or other officers from the Act. Even still, in the case of Cook vs. Millers Industrial Underwriters,

Tex ____, 240 S. 535, the court held that the injured party was not excluded under the Act although he was general manager or superintendent and had full charge of matters pertaining to the management of the gin works, and had authority to and did employ and discharge laborers, the other part owner of the gin works taking no part in the actual management of the same and being only familiar with its business or financial affairs of the company. The claimant was receiving a salary from the company.

It was contended in that case by counsel for the insurance company that he could not be an employee because he was admittedly an employer, but the court overruled this objection, taking the view that in employing and discharging workmen he was acting not for himself, but for the corporation of which he was, incidentally, an officer and stockholder.

The facts of the case at hand are very similar. Roland B. Smith was the president and general manager of the two corporations located in Brigham City. He devoted approximately two-thirds of his time to these businesses. He was indirectly responsible for all hiring and firing, general plant supervision, and received a salary as such from each of the corporations, not as president, but as the general manager. It should be noted that none of the other officers of the corporations in question were listed on the payroll from which the premiums were paid to the insurance carrier as employees, nor did any of them perform any services as far as the evidence discloses to these corporations other than those usually performed by executive officers. Not so, however, with the deceased. The services performed by him were far in excess of those generally performed by a president acting merely in an executive capacity. He went to the plant daily and aided in setting up the machinery.

although it was not shown whether he actually worked with the tools. During the packing season he was in the plant long hours checking to see that all was going well. He was the general purchasing agent making all purchases of supplies and equipment, and was in charge of sales for the corporations. This is not a case of an executive officer of a large corporation who does nothing but sit behind a desk all day, but the corporations in question are comparatively small food processing companies having only about ten full time employees for both companies and a high of about two hundred fifty part time employees during the main packing season, nor is it the case of the holder of practically all of the stock becoming the alter ego of the corporation. The wages paid to the deceased by the corporations were not continued after the accident which would, in my opinion, indicate that the money which he received was for services rendered as an employee, and not as president of the corporation.

The case of Leigh Attichison, Inc., vs. Industrial Commission, 138 Wis. 218, 205 N.W. 806, decided by the Supreme Court of Wisconsin on November 17, 1925, which case is relied on quite heavily in the Defendants' brief, has been distinguished in other cases before the same court. This case is good authority for one proposition and one proposition only, and that is that where a full time executive officer not otherwise covered by the Act, and whose salary is not included in the report upon which premiums are paid, is at the time of his injury performing work normally performed by a workman, he does not thereby lose his status as an executive officer and become an employee for that short period within the terms of the Workmen's Compensation Act. If any of these factors are missing, the case does not apply. For example, in the case of Zurich General Accident and Liability Ins. vs. Industrial Commission (1927) 193 Wis. 32,

213 N# 630 wherein they specifically distinguished the Attichison case and awarded compensation for the death of the president, director and substantial stockholder occurring in the course of his duties as superintendent of construction the court said:

"It is conceded that, besides holding the office of president of the company and discharging the duties pertaining to that office, he also acted as superintendent of construction upon the works. This constituted an employment palpably separate and distinct from the official duties falling upon him as president of the company. While performing such duties, he stood in the same relation to the company that any other superintendent of construction, in the employ of the company would occupy. ~~and~~ We conclude that, while acting as superintendent of construction, the deceased was primarily an employee of the company." (Emphasis added)

Likewise in the case of Columbia Casualty Company vs. Industrial Commission (1929) 200 Wis. 6, 227, N# 292, wherein they again distinguish the Attichison case, the claimant was secretary and treasurer and majority stockholder of a wholesale oyster company in which his son was president and the only other stockholder, both of whom drew a salary from the company and then divided the profits of the operation. The court held again that the claimant was clearly an employee of the company and entitled to compensation. Incidentally, the policy in the Columbia case had the exact same clause which is found in the policy in question; namely that the president, secretary and treasurer of a corporation are by the policy in effect classified as employees if actually performing such duties

as are ordinarily undertaken by a superintendent, foreman or workman.

Going even a step further and extending the coverage to corporate officers under an act containing language similar to that of our statute, the case of Stevens vs. Industrial Commission, ___ Ill. ___, 179 NE 102, the court stated:

"The act applies automatically not only to the corporation, but to all its employees regardless of the kind of work in which they may be engaged."

Citing as authority for this position:

Ill. Publishing & Printing Co. vs. Ind. Comm., 299 Ill. 189, 132 NE 511.
McNaught vs. Mines, 300 Ill. 167, 133 NE 652.
Porter Co. vs. Ind. Comm., 301 Ill. 76, 133 NE 652.
Ascher Bros. vs. Ind. Comm., 311 Ill. 258, 142 NE 488.

An interesting case which sets out the history of the Workmen's Compensation Acts first to cover only the employees engaged in hazardous occupations and later extended to "white collar" workers and other employees is Hirsch vs. Hirsch Brothers, ___ NE ___, 92 A2d 402 (1952).

In passing from this point I would like to comment further on some of the cases relied on by the Defendants in their Memorandum of Authority. The New York case of Bowne vs. S. W. Bowne Company, 221 NY 28, 116 NE 364, was decided on May 8, 1917, under a statute which provided in part, coverage of "a person who is engaged in a hazardous employment." New York has since changed its law, as previously noted, and now expressly covers all corporate executives regardless of the

nature of their services to the corporation, unless they elect to the contrary. (New York Workmen's Compensation Act Sec. 54 (6)). Likewise, the New York case of Kolpian vs. O'Donnell Lumber Company, et al, 230 NY 301, 130 NB 301, was decided on March 1, 1921, under the same New York statute limiting coverage to one engaged in a hazardous employment. These cases should not be considered as authority for denying coverage in the case at hand because the statute was so drastically different than Utah's.

In the case of Higgins vs. Bates Street Shirt Company, et al, 129 NB 6, 147 Atl. 147, decided on February 21, 1930, under a statute very similar to that of Utah, the court states:

"The authorities hold that a president of a corporation is not precluded from becoming an employee within the meaning of the above definition, a corporation may hire its president to perform services for it under circumstances which will make him an employee."

It then went on to state that under the facts of that case he was not paid for his services as an employee, but received only his salary as president of the company. This is not the case here.

In the case of Brown vs. Conway Electric Light & Power Company, 82 NA 78, 129 Atl. 633, decided May 5, 1925, the statute in question contained the language that the Act applies "only to workmen engaged in manual or mechanical labor" in certain employments only. Therefore, the decision was that the manager of the electric company who was killed while watching workmen repair a transformer, but who was not performing any manual labor, was not entitled to compensation, the court stating:

"If an officer or executive agent of an employer has no duties of manual or mechanical labor the Act does not constitute him a workman within its provisions."
(Emphasis added)

In the case of Carville vs. A. F. Bernot & Company, 286 Pa. 104, 135 Atl. 652, decided January 3, 1927, the statute in question stated:

"The term employee ~~and~~ is declared to be synonymous with servant."

The court, in denying coverage to the president who was paid \$7,000 per year, stated:

"The evidence clearly shows that he was a salaried executive officer, and the compensation paid him was not in any sense of the words, wages upon a contract of hiring."

"The president, uncle of decedent, testified that decedent was manager, but there was no corporation provision for a manager and no employment of decedent or wages paid to him as manager."

To the same effect, in the case of Hanfield and Firman Company vs. Hanfield, 9 Ind. App. 70, 182 NE 539, decided October 5, 1932, the court said:

"In order to entitle such a person to compensation in a general way, he must be an employee, whose remuneration is popularly designated as wages rather than salary."

These cases should not be taken as authority for denying compensation under the wording of our statute. Since they were decided, as pointed out

above, drastic changes have taken place, not only in the wording of the statutes of the various states, but also in the extent to which the acts have extended their protective arms to cover "white collar" workers as well as the sweating laborer.

POINT II

THE DEFENDANT, NATIONAL SURETY COMPANY, HAVING RECEIVED PREMIUMS ON THE INSURANCE POLICY BASED UPON THE SALARY PAID TO THE DECEASED, IS ESTOPPED TO ASSERT THAT HE IS NOT AN EMPLOYEE WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT.

In the case of *McLain vs. National Mutual Casualty Company*, La. ___, 28 So. 2nd. 680, decided December 12, 1946, the facts were these: The plaintiff had for many years operated a shingle mill in Grant Parish, Louisiana. In 1937 he conveyed all of his property to his wife, who thereafter conducted the business, but he continued to work in the mill. In reporting the payroll for the purpose of establishing the premium on the Workmen's Compensation policy, she included the salary of her husband. The court, in holding that the husband was entitled to compensation on the grounds that the insurance carrier was estopped to deny coverage, having received the premium based on his salary, made the following statement:

"The evidence warrants the conclusion that the agents and representatives of the defendant had knowledge that the plaintiff was carried on the payroll of the insured as an employee and that it collected premiums on the policy based on the payroll that included plaintiff's salary and are estopped to say that the plaintiff was not an employee."

The court quoted in support of this position the

following cases:

Stearry vs. Hope Ins. Co., 37 La. Ann. 251.

Union National Bank vs. Manhattan Life Insurance Company, 52 La. Ann. 36, 26 So. 800.

Corporation of Roman Catholic Church vs. Royal Insurance Company, 156 La. 601, 104 So. 383.

Citt Cash Factory, Inc., vs. Union Insurance Company, 140 La. 381, 107 So. 232.

Dutton vs. Harmonia Insurance Company, 191 La. 791, 38 So. 562.

Likewise in the case of Columbia Casualty Company vs. Industrial Commission, supra, they held that the Workmen's Compensation insurance carrier was estopped to claim that the secretary and treasurer who owned 70% of the stock of the corporation was not entitled to compensation for injuries sustained while performing services growing out of and incidental to his employment under the Workmen's Compensation Act, Sec. 102.03, where policy provided that premium was based on remuneration of officers actually performing duties ordinarily undertaken by superintendents, foremen or workmen and salary of secretary and treasurer was included in aggregate on which premium was finally based. The policy in this case, as previously noted, had the same clause that we have in the policy at hand.

In the case of Jones vs. Planter's National Bank & Trust Company, NC., 173 SE 595, after holding that the executive officer was an ordinary employee, the court made the following statement:

"Even if this were not true it would seem that the defendant insurance carrier, having received the name of this claimant as an employee of the defendant bank and having collected premiums based upon his payroll, has waived any question as to the status of the employee and it ought to be estopped

to now claim that he is not an employee but the managing head of the corporation, and so hold."

The court cited as authority for this position the following cases:

Reeves vs. Parker-Graham-Sexton, Inc., 199 NC, 236, 154 SE. 66.

Matherson Motor Sales Corp., 201 NC. 303, 160 SE. 283.

Columbia Casualty Company vs. Industrial Comm., 200 Wis. 8, 227 N.W. 292.

Maryland Casualty Co., vs. Wells, 35 Ga. App. 759, 134 SE 788.

Kennedy vs. Kennedy Mfg. and Eng. Company, 177 App. Div. 56, 163 N.Y. Supp. 944.

Strong vs. Electric Company, 152 Atl. 242, 8 N.J. Misc. 873.

Republic Casualty Co. vs. Industrial Comm. 322 Ill. 169, 152 NE. 479.

As the exhibits in the case will indicate, the payroll upon which the premium in question was based covered the salaries of only a very few employees and the deceased was expressly enumerated and his salary reported. It is safe to assume that the agent who executed the policy had knowledge of the services performed by the deceased and fully intended that his salary be included for the purposes of the premium. In fact, under the decision of several cases they would have had the right to insist that his salary be included had the corporations neglected or refused to do so.

CONCLUSION

Although I feel the issue is not properly before this court at this time, in the event the matter is considered, the decedent can and should be held to be covered in the case at hand. He owned only 34.2% of the stock in Box Elder Packing Corporation and 37% of the stock in Smith Frozen

Foods, Inc. Both corporations had other officers, but they received little, if any, salary from these corporations, and their names were not included on the payroll upon which the compensation premiums was computed. This clearly indicated without question that the funds which Roland B. Smith received were for his services as general manager of the two corporations, and it can not be said that he was not covered under the Workmen's Compensation Act at the time of death.

Respectfully submitted,

Attorney for Plaintiff