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L. Jack Graham v. Industrial Commission of Utah et al : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

L. JACK GRAHAM, Plaintiff-Appellant vs. THE INDUSTRIAL COMMISSION OF UTAH, R. THORNE FOUNDATION and STATE INSURANCE FUND, Defendants.	)	Supreme Court No. 18363

BRIEF OF PLAINTIFF-APPELLANT

Appeal from the Order of the Industrial Commission
of the State of Utah

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STATEMENT OF NATURE OF CASE

This case is an appeal from an order by the Industrial Commission affirming the Findings of Fact, Conclusions of Law and Order of the administrative law judge.

DISPOSITION BY THE INDUSTRIAL COMMISSION OF UTAH

The administrative law judge ruled that the plaintiff, L. Jack Graham, was not entitled to workers compensation benefits as against his employer, R. Thorne Foundation and its insurance carrier State Insurance Fund for the reason that plaintiff was an independent contractor and not an

employee. This ruling was affirmed by the Industrial Commission by a majority vote.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks a reversal of the Order made by the administrative law judge and affirmed by the Industrial Commission.

STATEMENT OF FACTS

The Plaintiff herein, a roofer by trade approached Thorne, a general contractor (R. 72), seeking work as a roofer when plaintiff observed homes under construction by Thorne (R. 12, 13). Plaintiff contacted defendant Thorne by telephone. Defendant was asked "...if he had a roofer, or if he needed a roofer" (R. 13). Plaintiff described his method of application (R. 13); that he used nails instead of staples; that he "dried" the roof before applying shingles (R. 14). Defendant contacted plaintiff and indicated "...that he would like me to shingle his roofs. He told me that the roof I had approached him on was not quite ready to be shingled, but that he had three others in another subdivision" (R. 15). A price was agreed upon--$8.00 per square if dried in by plaintiff and $6.50 per square if done by others (R. 14 through 16). The plaintiff provided the nails and billed defendant for them. A starting time was agreed upon

and plaintiff commenced work (R. 17). When plaintiff arrived at the job, some bundles were in place on the roof, having been delivered by defendants' men.

On December 10, 1980, plaintiff slipped while carrying a bundle of shingles up a ladder spraining his wrist (R. 17). Plaintiff was unable to work for one week (R. 27). In February 1981 plaintiff had a second and far more serious fall (R. 28).

Defendants denied liability on basis of plaintiff being an independent contractor, and not an employee. Plaintiff contends that he was contractor over whom defendant retained supervision and control.

On the facts of control or right to control: plaintiff and defendant negotiated the price per square (R. 14); plaintiff supplied nails and charged them to defendant (R. 14); defendant determined time to start a house (R. 15); plaintiff was directed to use odd pieces of shingles for first course and delivery of same by defendant (R. 17); defendant prescribed the method of installing flashing (R. 18); defendant required plaintiff to wait for completion of plumbing (R. 19); billing on a time basis for extra work (R. 20); ordering short when requested by defendant (R. 23); direction to leave two of defendants' homes in order to start a third home (R. 28); defendants' decision to have plaintiff dry the roof as he shingled (R. 28, 29); general

discussions with defendant as to how he wanted certain roofs handled (R. 37).

ARGUMENT

POINT 1

THE WORK DONE BY THE PLAINTIFF WAS IN FACT WORK PERFORMED IN THE USUAL COURSE OF BUSINESS CARRIED ON BY DEFENDANTS AS REQUIRED BY SECTION 35-1-42, UTAH CODE ANNOTATED 1953.

It is apparent from a review of the record and the arguments by defendants before the administrative law judge that the essential facts in the case are not in serious dispute. The issue is how these agreed facts are applied to section 35-1-42 (2) U.C.A. 1953.

Section 35-1-42 (2) provides in part:

> "...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 subcontractor, shall be deemed, within the meaning of this section, employees of such original employer..." (Underscoring added.)

With reference to the quoted section the issue narrows itself as to whether or not there are sufficient facts upon which the Commission based a decision that the roofing was

not a "part or process in the trade or business of the employer."

The administrative law judge in his decision failed completely to address this problem. His sole and only determination was to find that the plaintiff "...was an independent contractor and as such is not entitled to workmens compensation benefits from the defendant." The administrative law judge's decision was based upon the fact that the defendant was not an employee to which finding defendant does not disagree.

The Commission on appeal affirmed this decision by a 2 to 1 vote. The dissenting commissioner only touched on the problem by stating: "The practice of the general contractor to call all employees 'independent contractors' is a deliberate avoidance of the employer's statutory responsibility to provide workers compensation coverage."

Most attorneys in dealing with this statute (35-1-42 (2)) refer to the status as "statutory employment" or a "statutory employee." Most of the attributes of common law employment are not present but the effect of this statute is to create an employment relationship and corresponding responsibility in modifying the common law.

In going through the statute step by step as underscored above, the key elements will be discussed.

The work of applying shingles to the roof of the house erected and constructed by defendants was a part and parcel of the business of defendant as a home building contractor thus making the plaintiff a statutory employee of defendant. (Underscoring added.)

The Utah Supreme Court has held substantially this way in Smith v. Alfred Brown Co., 493 P2d 994, 27 U2d 155 (1977).

The court stated:

> "The 'trade or business of the employer,' defendant Brown, was the total project, the construction of the dormitory.[4] Id., p. 996."

The record shows that the defendant did not employ any one except a bookkeeper and cleanup men.

Defendant was asked about employees:

"A. I have employees that are general maintenance type people, that run errands and do miscellaneous things.

Q. And maybe a bookkeeper, office people, or something like this?

A. Yes.

Q. But all of the work in connection with your homes, your home construction itself is all contracted out?

A. That's correct. 99%.

Q. Then what is the consideration?

A. The consideration is that it is just a matter of liability..."

The defendant is a licensed building contractor, yet he employs no craftsmen to build. He represents to the public that the defendant builds the home yet he employs no one to engage in that activity.

As stated in Smith, supra, "the trade or business of Brown was the total project." Here the trade or business of the defendant was the totality of the project--construct and sell completed homes.

Plaintiff concedes that he is not a common law employee as determined by the commission. However, the mere fact that defendant hires no employees of the building crafts type does not mean that the so-called "independent contractors" are not "statutory employees."

The general rule requiring construction workers to be covered by worker's compensation is restated in Bambrough v. Bethers 552 P2d 1286, 1291 (Utah 1976) wherein the court stated:

> Recent decisions of this court have held that a worker can be hired and paid by a sub-contractor but still be an employee of the general contractor (citing Smith v Brown). Further it is the right to control which is determinative; the degree of control is not essential."

The record is clear that defendant is engaged in the homebuilding industry; that an integral part of such

construction is roofing; that plaintiff was an independant worker who performed a necessary part or process in the building of defendants' homes and that plaintiff is entitled to that status.

POINT II

THE DEFENDANT DID SUPERVISE OR HAD THE RIGHT TO SUPERVISE THE WORK OF PLAINTIFF.

In the initial statement of facts the record was set forth giving the instances of apparent control or the right to control. (The final paragraph above of the statement of facts.)

The foregoing details essentially all of the instances of either actual control over the details of the work or the right to control the work. In addition there is little doubt that defendant could terminate the relationship at will. The method of payment was strictly piece work for each square laid and not for the total project. Nothing was reduced to writing, no bids were extended to other roofers. The only consideration was the piece work basis of compensation.

The elements of right to control appear to be present in this case at best and the exercise of such rights may not be established in fact. The <u>right</u> to control is what we are here concerned with.

It is well settled in this state that the status of an employee is essentially determined by either the supervision in fact of the details of the work of the employee or the right to exercise such supervision.

In Sommerville v. Industrial Commission, 118 U504, 196 P2d 718 (1948) this court resolved the question of status by declaring it to be a jurisdictional question. The court said in part:

> "The question of whether or not one engaged in a service for another is an employee or an independent contractor, within the meaning of the Workmen's Compensation Act, is a jurisdictional question, presenting a situation which requires this court to determine the status from the facts submitted, by a preponderance of the evidence. But where, as here, the evidence in the case is largely uncontradicted, the problem is not so much one of examining the record to determine whether the evidence preponderates for or against the conclusion of the Commission, but rather of determining whether the Commission drew the correct legal conclusion therefrom."

In Somerville, supra, no evidence was available that defendant was engaged in maintenance and repair activities, no evidence was available that the coffee shop operated by defendants was the subject of the maintenance and repair but a building separate and distinct from the employer, no evidence was available that defendant participated and supervised the details of the maintenance activity. No other employees of the employer were engaged in maintenance activities. For these reasons alone there is sufficient

distinction on the facts without detailing all of the differences.

In Anderson v. Last Chance Ranch Co., 63 U. 551, 228 P. 184, (1924) the nature of the business arose as an issue because of the statutory exclusion of agricultural employees. Section 35-1-43 (2), Utah Code Annotated, 1953, provides in part:

> "The words 'employee', 'workmen' and 'operative', as used in this title shall be construed to mean:
>
> (2) Every person, except agricultural laborers and domestic servants, in the service of any 'employer' as defined in subdivision (2) of section 35-1-42 who employs one or more workmen or operatives regularly in the same business..."

The court in construing the above section was only concerned about the "general business of the employer". The court held that the "ranch company" was engaged in agricultural pursuits and not building construction. The effect of the finding was to establish that the "employer" was in fact not a covered employer under the act and the claim of the employee failed.

The claim failed--not because the employee was in a different status from that of the employer. The claim failed because the employer was excluded from required coverage because the employer was engaged in agricultural pursuit.

It appears that this case actually presents an argument in favor of defendants since the court applied a broader rule about status and said:

> In a narrow and restricted view of the transaction, plaintiff at the very moment of his injury was an agricultural laborer...In the broader sense he was a carpenter's helper...We are not inclined to dispose of the case upon the narrow view above referred to." Anderson v. Last Chance Ranch, supra.

The court then proceeded to find--on the broader view--that the employer was basically agricultural and not subject to the act.

In the Somerville case, supra, the court held:

> "It is now well settled in the jurisdiction that the crucial factor in determining whether an applicant for workmen's compensation is an employee or an independent contractor is whether or not the person for whom the services were performed had the right to control the execution of the work."

This court has already stated the "crucial factor" in determining the status is "whether or not the person for whom the services were performed had the right to control the execution of the work." Sommerville, supra.

Let us review the facts on the elements of control. Plaintiff and defendant negotiated the piece work rate (R. 14); plaintiff supplied nails and charged to defendant (R. 15); plaintiff ordered materials from defendants' supplier (R 21-23); defendant decided time to start house (R. 15);

plaintiff was directed to use old shingles for first course (R. 18); defendant directed the installation of flashing (R. 18); defendant required plaintiff to wait for plumbing (R. 18); billing by the hour for extra work (R. 28); direction to leave two homes to work on a third (R. 28); plaintiff to dry roof as he shingled (R. 28, 29); general discussions regarding how roofs generally were to be handled (R. 37).

The foregoing demonstrates the exercise of control in fact. Additional and implied rights are obvious on the part of the defendant. Defendant had the right to terminate the relationship at will, the duration of the contract was strictly house by house, the method of payment was "piece work" rather than by the hour or day and no taxes were withheld or paid by defendant.

In Plewe Construction Co. v. Industrial Commission, 121 U. 375, 242 P2d 561, the matter of control by a general contractor over a subcontractor was discussed at length. In that case a roofing contractor employed shinglers and paid them by the square to install a roof on a building erected by the general contractor. An employee of the roofing contractor was hurt. The roofing contractor had no insurance but Plewe, the general contractor, did. Plewe's control consisted of advising the roofers to lay the shingles straight and use a chalk line. The court held that Plewe exercised sufficient control over the work to find that the

employees of the subcontractor were statutory employees of Plewe and entitled to benefits.

In a more recent case this court again spelled out the criteria to use in arriving at this nebulous thing called control or right to control. In Harry L. Young and Sons, Inc., v. Industrial Comm. 538 P2d 316 this court said:

> "This is one of the frequently encountered cases which justifies the view taken by the commission that the employer wanted the 'best of two worlds'. On the one hand, to have a person rendering the service over whom he can maintain a high degree of control; and at the same time to avoid the responsibilities he would have to an employee. The trouble arises when an employee is injured he wants to be classified as an employee and get workmen's compensation.
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> ---
>
> In determining whether the statutory requirements are met, the courts have considered numerous factors relating to the employer-employee relationship, and have pointed out that none of them considered alone is completely controlling, but that they all should be considered together in determining whether the requirements of the statute are met.
>
> Speaking in generality; An employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set sum, who may do the job his own way, subject to only minimal restrictions or controls and is responsible only for its satisfactory completion.
>
> The main facts to be considered on the relationship here are: (1) whatever covenants or agreements exist concerning the right of direction and

> control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment, i.e. whether in wages or fees as compared to payment for a complete job or project; and (4) the furnishing of the equipment."

It is urged upon this court that the foregoing facts and applicable law are related to the status of "independent contractor" as opposed to "employer". It appears that in Plewe Construction Co., supra, the statutory employer "requires considerably less by way of control than the strict employer relationship."

The Supreme Court in discussing the statutory employee section of the code stated in Rustler Lodge v. Industrial Commission (552 P2d 227):

> "U.C.A. 1953, 35-1-42 (2) is pertinent to our disposition here and it reads in part as follows:
>
> > ...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 sub-contractors under him, and all persons employed by any such subcontractor, shall be deemed, within the meaning of this section, employees of such original employer... (Emphasis added.)

In determining whether the Commission drew correct legal conclusions from the facts a further brief review of the facts is helpful. It appears clear that the lodge regularly employed maintenance and handy men and Jensen in fact acknowledged that they were engaged in the performance of

light construction activity about the lodge at the same time in question.

It must be conceded that drywall and ceiling repairs are activities common to most businesses, particularly a lodge and restaurant, and that the services performed by Jensen were in the same nature of maintenance and repairs being carried on by other employees of the lodge and hence a part or process of the trade or business of the lodge.

The fact that Jensen was taken over the entire job, shown what services were to be performed, not allowed to commence work on his first appearance, directed where to stack the dry wall and to use care in protecting the floor, furnished a protective covering and a ladder and paid at an hourly rate, are all indicative of adequate elements of control to warrant the findings of the Commission. It is noted that there are no facts to support a possible substitution of workman as discussed in Ludlow, supra. Quite to the contrary, the lodge first contacted Jensen's <u>firm</u> which declined to take the job and made a referral to applicant individually and such is indicative of the intent of the parties establishing an employee relationship.

> The evidence here, viewed in the light of the numerous pronouncements of this court, provides a reasonable basis for the conclusion reached by the Commission that Jensen was an employee."

In the <u>Plewe Construction Co.</u>, supra, a statutory employment relationship was created. In that case the roofing contractor was truly independent (the injured was an employee of the roofing contractor). However Plewe (the general contractor) exercised, at best, minimal control. Such minimal control was sufficient to create the statutory employment relationship.

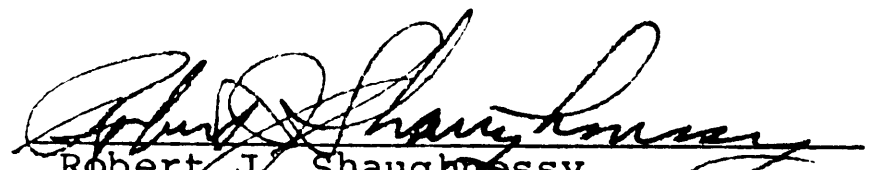
The element of plaintiff and defendant being engaged in the same type of work (home construction) is clearly present. The element of control or right to control--to whatever degree one wants to find--is present. The status of plaintiff as an independent contractor can be inferred. The ultimate fact appears that plaintiff is either a direct employee of defendant or a statutory employee of defendant. He must be one or the other.

CONCLUSIONS

A careful analysis of the facts as determined by the Industrial Commission together with factual matters overlooked or ignored by the Industrial Commission leads to the conclusion that the Commission erred. Plaintiff was an employee of the defendant--either direct or statutory. The Commission reached an incorrect conclusion in applying those facts against the appropriate law. Such decision should be reversed.

DATED, this _____ day of June 1983.

Respectfully submitted,



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