1983

L. Jack Graham v. Industrial Commission of Utah et al : Brief of Defendant-Appellee

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-Appellee,	:	Supreme Court No. 18363

BRIEF OF DEFENDANT-APPELLEE

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

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STATEMENT OF THE NATURE OF THE CASE

This case is an appeal from an order of the Industrial Commission confirming the Findings of Fact and Conclusions of Law of the Administrative Law Judge.

DISPOSITION BY INDUSTRIAL COMMISSION

The Administrative Law Judge ruled that the plaintiff, L. Jack Graham, was an independent contractor and therefore not entitled to receive worker's compensation benefits from R. Thorne Foundation and its insurance carrier, The State Insurance Fund. The Administrative Law Judge, Keith E. Sohm, entered his Findings of Fact, Conclusions of Law and Order on January 21, 1982. The Industrial Commission of Utah affirmed the Findings of Fact, Conclusions of Law and Order and denied of the plaintiff's Motion for Review on March 9, 1982.

RELIEF SOUGHT ON APPEAL

Defendant-Appellee is asking this court to affirm the Order of the Industrial Commission.

STATEMENT OF FACTS

On or about November 8, 1980, plaintiff Graham ("plaintiff") contacted R. Thorne, owner of defendant corporation (hereinafter jointly and severally "defendant") offering to shingle roofs on homes defendant was constructing. (R. 13) Plaintiff and defendant entered into an informal telephone agreement whereby plaintiff agreed to shingle houses for a fee between $6.50 and $8.00 per square. (R. 14)

Plaintiff has been involved in the roofing business, in some capacity, for 41 years (R. 11). During that period of time, he has developed certain techniques in roofing. For instance, plaintiff uses strip flashing on a roof as opposed to normal continuous flashing procedures. (R. 18) Plaintiff used these techniques on defendant's homes even though these techniques were not normally followed on the homes constructed by defendant. (R. 18)

During November and December of 1980 and January and February of 1981, plaintiff periodically shingled houses for defendant. (R. 12, 54) Plaintiff billed defendant on a monthly basis for homes on which he had completed the roofing. (R. 20) Throughout plaintiff's contractual relationship with defendant, plaintiff "was given some latitude in decision making." (R. 37) Plaintiff used all his own tools (R. 63) and worked on his own time schedule. (R. 61) Defendant never instructed plaintiff as to when or how to do the work. (R. 74) Defendant himself knows very little about roofing. (R.73) On only one occasion,

plaintiff did accomodate defendant by beginning work on a roof before the roofing on another house had been completed. (R. 28) Defendant did not deduct social security or withholding taxes from plaintiff's checks. (R. 36) Defendant informed plaintiff he was not covered by insurance. (R. 56, 77) On occasion, plaintiff hired others to help him do the shingling on the defendant's homes. (R. 25,26,57) During this period, plaintiff worked for three other contractors. (R. 52) During January, 1980, plaintiff worked only three days on homes being constructed by defendant and worked the rest of the month for other contractors. (R. 55)

Plaintiff was injured in two separate accidents while working on defendant's homes. On November 25, 1980, defendant slipped while carrying a bundle of shingles up the ladder. (R. 99) His son took him to the Valley West Emergency Room where it was determined that plaintiff had sustained minor wrist and shoulder injuries. (R. 99) On February 6, 1981, plaintiff slipped on some ice causing him to fall off the building on which he was working. Plaintiff incurred various injuries in this fall, including a fractured wrist, pelvis and hip. (R. 99)

ARGUMENT

POINT I

THE FINDING OF THE ADMINISTRATIVE LAW JUDGE, UPHELD BY THE INDUSTRIAL COMMISSION, THAT THE PLAINTIFF WAS AN INDEPENDENT CONTRACTOR AND, THEREFORE, NOT ENTITLED TO RECOVER WORKER'S COMPENSATION WAS WITHIN THE COMMISSION'S DISCRETION AND SHOULD NOT BE REVERSED BY THIS COURT.

It is well settled law that this Court should reverse

the Industrial Commission's findings only if they are arbitrary and capricious or completely without support in the record. In Jones v. Ogden Auto Body, 646 P.2d 703 (Utah 1982), this court reasserted the standard of review set forth in Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (Utah 1981), and affirmed the Commission's order:

> . . . This court's function in reviewing the Commission's findings is a strictly limited one in which the question is not whether the court agrees with the Commission's findings or whether they are supported by the preponderance of the evidence. Instead, the reviewing court inquiry is whether the Commission's findings are "arbitrary or capricious" or "wholly without cause" or contrary to the "one (inevitable) conclusion from the evidence" or without any substantial evidence to support them. Only then should the Commission's findings be displaced.

Id. at 890.

The Comission's findings in the instant case do not fall under any of the exceptions and, therefore, should not be reversed. The findings, based on a complete evidentiary hearing before the Administrative Law Judge are not arbitrary and capricious. Nor were the findings "wholly without cause" or contrary to the "one inevitable conclusion from the evidence" or without "any substantial evidence to support them." The record is replete with decision making procedures, and other matters which provide a wholly rational basis for the findings of the Administrative Law Judge affirmed by the Commission. In his Findings of Fact the Administrative Law Judge pointed to some of the evidence upon which he based his conclusion:

> Doing piece work as a carpenter, the applicant usually was paid by the hour with no deductions,

but when doing roof work he was paid by the square with no deductions being taken out for taxes or social security. The applicant worked on his own schedule, sometimes working on one house and sometimes working on another house and sometimes working on other jobs and then returning to the Thorne Construction job. If the applicant could not do some of the work he would hire someone to do it. He had his son and other helpers on the job, he supervised their work though they usually had their own tools. At the same time he was working on the Thorne Construction job he was also working on other jobs for other contractors at the same time, going to and from the jobs at his own discretion. The other companies did not withhold social security or income taxes either. Thorne Construction allowed the applicant to order supplies on occassion because his computation was more accurate because he knew exactly how much more work was to be done. Mr. Thorne had informed the applicant that he was not covered by workmen's compensation benefits. (R. 99)

The record demonstrates that the findings approved by the Commission were not arbitrary, capricious or without support and, therefore, this court should affirm the Comission's order.

POINT II

EVEN IF THE WORK DONE BY THE PLAINTIFF WAS WORK PERFORMED IN THE USUAL COURSE OF DEFENDANT'S BUSINESS, THAT FACT ALONE IS INSUFFICIENT TO QUALIFY PLAINTIFF AS AN EMPLOYEE UNDER UTAH CODE ANN. SECTION 35-1-42 (1953 AS AMENDED).

As plaintiff's brief, at Point I, explains, the issue in this case depends upon application of Utah Code Ann. Section 35-1-42. That statute defines the terms "employee" and "independent contractor." Employees are entitled to recover worker's compensation benefits from their employers. Independent contractors are not entitled to worker's compensation benefits. The relevant portion of that statute 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, said 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. (emphasis added)

This section clearly states that the contractor must retain supervision and control over the work and the work must be performed in the usual course of the contractor's business. Since defendant did not retain supervision or control over plaintiff's work, it is irrelevant whether the work performed by the plaintiff was work that was a part or process in the trade or business of defendant. The Administrative Law Judge did not need to address this issue since he clearly based his decision on those facts in the record which demonstrated defendant did not retain supervision or control over the plaintiff's work.

POINT III

DEFENDANT DID NOT RETAIN SUPERVISION OR CONTROL OVER PLAINTIFF'S WORK WITHIN THE MEANING OF UTAH CODE ANN. SECTION 35-1-42.

The evidence established before the Administrative Law Judge mandated a finding that the defendant did not exercise control over plaintiff's work. The plaintiff worked on his own time schedule, employed by his own techniques, used his own tools, billed defendant monthly on completed houses, and, on occassion, employed others to work for him. Moreover, defendant did not

deduct social security or withholding from plaintiff's checks and he informed the plaintiff that he was not covered by worker's compensation.

Plaintiff, in his brief, relies on various facts to assert that defendant exercised control or, at least, retained the right to control plaintiff's work. These facts do not establish control or the right to control. For instance, the plaintiff relies on the fact that the defendant could terminate the relationship at will. This is totally irrelevant to the issue of control. Certainly plaintiff also could have terminated the relationship at will. Plaintiff relies on a few particular incidences when he and defendant worked together on procedural problems, such as timing, to argue that defendant exercised control. These facts (plaintiff's brief p. 3-4) do not demonstrate any real degree of control on defendant's part but merely suggest that defendant and plaintiff worked together to complete the project according to defendant's design.

Throughout his brief, plaintiff suggests that defendant classified plaintiff as an independent contractor merely to avoid liability and, therefore, plaintiff is entitled to worker's compensation benefits. In Harry L. Young & Sons Inc., v. Industrial Commission, 538 P.2d 316 (Utah 1975), cited by plaintiff, this court, relying partially on the employer's intent to avoid insurance liability, held that the worker was an "employee" entitled to worker's compensation benefits. There is no evidence in this case indicating that defendant intentionally structured his business

to avoid insurance liability. Moreover, the crucial factor in Young was the high degree of control the employer exercised over the worker. This court, in Young, utilized a two prong test to determine the status of the workers. First, the employer's major concern in the structuring of the work relationship must be the avoidance of liability and, secondly, the employer must exercise control over the work. In Young the Commission found not only an intent to avoid insurance liability but also a substantial degree of control. This court upheld the findings of the Commission, stating:

> 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 a service over whom he can maintain a high degree of control; and at the same time to avoid the responsibility that he would have to an employee. (emphasis added)

Id. at 317.

In the instant case, neither the requirement of control nor the requirement of an intent to avoid liability has been met. The defendant did not maintain control or the right to control nor

Defendant's purpose in structuring his business in the manner he does is not to avoid Worker's Compensation liability to employees. Plaintiff cites from the record to support such an allegation. That citation, which follows, is incomplete:

> A. I have employees that are general maintenance type people, that run errands and do miscellaneous things.
>
> Q. And maybe a bookeeper, office people, or something like this?
>
> A. Yes.

Q. But all the work in connection with your homes, in 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. . .

(Plaintiff's brief at 6-7)

Defendant believes a more extensive citation will reveal that the defendant's purpose was not to avoid liability for insurance or taxes.

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. And the purpose of this, if you will, Mr. Thorne? Do you pay any insurance premiums, for anyone that contracts work for you, to the State Insurance Fund?

A. Are you speaking of plumbers and electricians?

Q. Any craftsman that work on any of your buildings?

A. I would say no. I have employees that have workmen's compensation paid for them, yes.

Q. All right.
Now do you withhold taxes, or pay social security taxes, on anyone who works in the construction area on your homes?

A. No, I don't.

Q. Is it not one of the purposes, to avoid the expense of insurance and taxes, that you build in this fashion?

MR. FERRE: I object to that your Honor.

THE COURT: He may answer.

MR. SHAUGHNESSY: I think he can answer it.

A. I would say not. No. Definitely not.

MR. SHAUGHNESSY: Q. It's not to avoid the expense of it?

A. It's not a consideration at all.

Q. Then what is the consideration?

A. The consideration is that it's just a matter of liability. I don't what to have to worry about keeping a crew of men busy all the time because I'm busy for awhile, and they I have nothing for them to do. Then I'm busy again, and then have nothing for them to do. It is a lot easier to find a subcontractor and pay him an exact figure. To know exactly what you have got in to a home, and have them take all the responsibility to do the home, and to have it done correct. I am not an authority in roofing. I am not an authority in tile work. It's better to get experts that know this. And I would have a million employees if I had to hire all those type of people.

This Court's holding in Young is inapplicable in the instant case since defendant did not purposely structure his business in such away as to avoid liability. Defendant structures his business as he does legitimate, business reasons.

Several facts which surfaced at the hearing indicate that plaintiff was an independant contractor. Plaintiff worked on his own time schedule. Indeed, plaintiff worked on defendant's homes for only three days in January. Plaintiff employed his own techniques.

Moreover, plaintiff hired his own workers on occassion. In Rustler Lodge v. Industrial Commission, 562 P.2d 227 (Utah 1977), the Supreme Court quoted with approval a prior holding, indicating that the ability to hire one's own workers prevented classification as "employee" for worker's compensation purposes:

> An independent contractor can employ others to do the work and accomplish the contemplated results without the consent of the contractee, while an employee could not substitute another in his place without the consent of the employer.

Id. at 228.

In Plewe Construction Company v. Industrial Commission, 242 P.2d 561 (Utah 1952), cited by plaintiff, the general contractor exercised extensive control over the employees of the independent The court in Plewe noted:

> Marshall and Hunt shingled about 58% of the roof, the Plewe Construction Company having obtained others to do the rest of it. When Marshall and Hunt reported for work, Mr. Plewe the president of the construction company, told them he wanted the shingles put on a quarter of an inch apart and spaced 5 inches to the weather, that they were to split the wide shingles and were to keep straight lines by chalking across. Mr. Plewe or his brother constantly supervised their work to see that those instructions were followed, sometimes requiring them to correct their work, particularly in regard to putting shingles.
>
> Mr. Plewe or his brother were at the job all the time they were working, looking over the workmen's work and directing them when they deemed it necessary, and Marshall and Hunt acquiesed and complied with all instructions.

Id. at 562.

Clearly, in the instant case, no such control was exercised. Defendant did not supervise plaintiff's work (R. 73,74).

Indeed, defendant admitted that he did not know enough about shingling to supervise the work. (R. 73) Furthermore, Plewe Construction is distinguishable from the instant case because the workers found to be employees in that case were employees of the independent contractor, not independent contractors themselves. There is a qualitative difference between determining an independent contractor to be an employee and determining that the independent contractor's employees are employees. The independent contractor maintains substantial control over his work, his schedule, his billing procedures, his techniques, etc. The employee of one employer, working for another, does not retain such control. Indeed in his findings of fact the Administrative Law Judge stated:

> Even though the definition of employee is very liberal under the law, and it may be so liberal that an employee of the applicant might successfully claim coverage under Thorne Construction, such interpretation cannot be made as to the applicant himself. It is very clear that the applicant went to work for the defendant as an independent contractor, carried out his work as an independent contractor and fell and was injured acting as an independent contractor. (Emphasis added) (R. 100)

In Harry L. Young & Sons Inc. v. Industrial Commission, 538 P.2d 316 (Utah 1975), also cited by plaintiff, this court upheld the Commission's finding that the worker was an employee. The general contractor, in that case, exercised a much greater degree of control over the worker. The court enumerated some the of facts upon which it was determined that the general contractor exercised sufficient control to declare the worker an employee:

> Before defendant could take a load he had to clear with plaintiff supervisor. He was not

> free to refuse to haul a load, or an oversized load. He was obliged to check with the dispatcher at points along the route as to his travel and time of arrival. He was 'advised' the number of miles the truck should operate each month which was not advice but more in the nature of a direction. The company set a speed limit of 5 miles per hour less than the lawful posted speed limit, for violation of which defendant was subject to penalty; and was in fact penalized for an infraction.

Id. at 318-319.

In the instant case, no similar evidence has been established. Indeed, most of the evidence demonstrates that the plaintiff alone exercised control over his work. Furthermore, Young is distinguishable because, in that case, the Supreme Court merely upheld the Commission's findings. Here, plaintiff is asking the court to reverse the Commission's findings.

Finally, plaintiff cites Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976), in support of his argument that he was an employee entitled to recover worker's compensation benefits. In Bambrough, the court found an employee of one employer to be an employee of a second employer for worker's compensation purposes. Bambrough, involved a fact situation very different from the situation in the instant case. In Bambrough, the plaintiff's original employer entered into a "trip-lease agreement" with the defendant whereby the parties agreed that plaintiff, a truck driver, would haul a load of wood, belonging to defendant, to Denver, Colorado. Before embarking on this trip, plaintiff called his original employer concerning certain procedures and was instructed, "If that's their procedure, you do it." Id. at 1289. The court relied heavily on this relinquishment of control by

plaintiff's original employer to find that the plaintiff, injured on the trip to Denver, was an employee of the defendant for worker's compensation purposes. Bambrough is clearly distinquishable. In the instant case, no relinquishment of control is evidenced. Furthermore, as in Plewe Construction Company, one must note the difference between determining an independent contractor (such as plaintiff herein) an employee and finding that an employee of one employer (such as plaintiff in Bambrough) is an employee of another employer for Worker's Compensation cases. In Bambrough, the employee retained no more control over his work under the supervision of the second employer than he did under the supervision of his original employer.

CONCLUSION

The Industrial Commission did not abuse its discretion in upholding the findings of the Administrative Law Judge and, therefore, this court should uphold that order. The defendant did not exercise sufficient control over the plaintiff's work to declare the plaintiff an employee entitled to receive worker's compensation benefits from the employer defendant or its insurance carrier, the State Insurance Fund. Therefore, defendant respectfully requests this court to uphold the Order of the Industrial Commission.

DATED THIS 30th Day of September, 1983.

BLACK & MOORE

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