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Sherman S. Dalton v. Industrial Commission of Utah et al : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the
State of Utah

FILED

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SHERMAN S. DALTON

Clerk, Supreme Court, Utah

Plaintiff and Appellant,

—VS.—

INDUSTRIAL COMMISSION OF UTAH
WAYNE RASMUSSEN COMPANY, and
GUARANTEE INSURANCE COMPANY

Defendants and Respondents.

BRIEF OF APPELLANT

JOHN L. BLACK

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Defendants and Respondents.

Case No.
8943

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

All italics are ours.

STATEMENT OF FACTS

This appeal arises from the Industrial Commission's denial of plaintiff's claim for benefits under the Workmen's Compensation Statutes of Utah. The claim arose from an accident which happened on February 13, 1955, at approximately eight miles west of Evanston, Wyoming on Highway 30S, when an automobile which plaintiff was

driving went out of control on an icy portion of the road and went off said road. Plaintiff was severely injured in said accident.

There is no dispute as to the benefits which plaintiff would be allowed were his claim approved. The sole issue dealt with by the Industrial Commission and involved in this appeal is whether or not plaintiff was an employee of the Wayne Rasmussen Company under the Workmen's Compensation laws of Utah.

The first hearing before the Industrial Commission in this matter was held on October 17, 1956, before the Honorable Robert J. Shaughnessy, Referee. At the outset it was stated by the Referee (R. 11) :

“As a result of an off-the-record discussion, the parties have stipulated that the sole issue to be determined at this hearing is whether or not there was a contract of employment existing between the Defendant Wayne Rasmussen Company and the Applicant Sherman S. Dalton.”

Pursuant to the foregoing, the hearing on October 17, 1956, dealt solely with evidence relating to the question of whether or not the plaintiff was an employee at the time of said accident. As a matter of fact counsel for defendants objected to the plaintiff testifying as to his hospital treatment and injuries for the reason that this hearing was concerned only with the facts concerning plaintiff's employment status (R. 22).

The evidence showed that Wayne Rasmussen Company at the time in question was a new and used car

dealer in Ogden, Utah, having the franchise for Studebaker. The plaintiff had formerly been employed by this company as a mechanic in the year 1952 and later when the business was sold to Richard Baxter. At the time the business was re-acquired by the Wayne Rasmussen Company the plaintiff, together with John Porter, bought the shop equipment and parts and leased the back part of the Rasmussen Company building forming a partnership in the automobile repair and maintenance business. The garage business of Dalton & Porter was separate and apart from the business of the Wayne Rasmussen Company. A great deal of the business of Dalton and Porter consisted of servicing new and used cars sent to them by the Wayne Rasmussen Company. It appeared that the Wayne Rasmussen Company had to maintain a front of appearing to own and operate a garage in connection with its business for the purpose of being able to keep its franchise. However, the evidence showed that the two businesses were separate and distinct.

As a regular part of the Wayne Rasmussen Company business, it was necessary to purchase used cars at some distance from Ogden, frequently in Wyoming and Idaho, and to bring said cars back to Ogden for the purpose of re-sale. Prior to February 13, 1955 the said company had customarily used regular employees to proceed to various places where used cars were purchased and to drive these cars back to its place of business at Ogden. Two regular employees by the names of A. J. Hansen and Scotty Metheny were customarily used for this service and sometimes Wayne Rasmussen himself would render

such services (R. 46-47). Also sometimes Mr. Naylor, who was in charge of buying and wholesaling used cars for the Wayne Rasmussen Company, and Mr. Rasmussen "would go out together and they would buy cars and other times Mr. Naylor would go out, sometimes to New Mexico, sometimes to Arizona, sometimes to Wyoming, and then he would hire people to get these cars in." (R. 47).

On February 11, 1955, plaintiff was approached by Mr. Naylor at his place of business and asked if he and his partner could go to Rock Springs and bring two cars in for the Wayne Rasmussen Company. At that time Mr. Dalton informed Mr. Naylor that he would talk to his partner and let him know. At the same time, Mr. Naylor informed Mr. Dalton that this was an emergency for the reason that they had no one else to pick up the two cars. The following morning, February 12, a Saturday, at approximately between 9:30 and 10:00 A.M., plaintiff told Naylor that he and his partner would go, and Naylor informed him that he would find out about the bus and make arrangements. In regard to the remuneration to be paid for the services the plaintiff testified (R. 18):

"Q. Was anything said as to any remuneration that you would receive for this trip?

A. Oh, he said he could pay \$25.00 to get the cars back here and that's all he could pay.

Q. And did he give you the \$25.00?

A. Yes sir.

Q. And were you to get the bus tickets with that money?

A. We bought the bus tickets out of that money, yes.

Q. And the \$25.00 was for the two of you?

A. For the two of us and the bus tickets."

Shortly after the conversation aforesaid, Naylor informed plaintiff as to the time of departure of the bus and gave him directions as to where to go after arriving at Rock Springs to pick up the cars. He also instructed plaintiff to fill the cars with gas and to charge the gas to the Wayne Rasmussen Company. Furthermore, Naylor informed Dalton that if they had any trouble on the way to pay for it and bring the bill, that the money would be refunded (R. 18). In this later conversation, Naylor stated that he was very happy they could go, that some people couldn't be depended upon to get the cars back. Naylor gave dealers' plates to plaintiff and his partner to use on the automobiles after they picked them up.

Plaintiff and his partner caught the bus from Ogden at approximately between 2 and 3 p.m. on Saturday, February 12, and arrived at Rock Springs at approximately 7 P.M. After arriving, they went to the place where they had been directed to go, and the person they were to see was waiting for them. They got in the cars and signed the tickets for the gasoline that had been put in said cars and then left, proceeding to a cafe for dinner. After eating, they started for Ogden. Plaintiff believes that at some point between Rock Springs and Evanston the oil was checked in one of the two cars and a quart of oil added. Plaintiff and his partner stopped in Evanston

for a few minutes and had some coffee, then proceeded towards Ogden to the point of the accident. The accident happened at approximately 2 A.M. on February 13 (R. 1).

Plaintiff further testified that the two bus tickets for himself and his partner had cost between \$4.00 and \$5.00 (R. 41). The bookkeeper for Wayne Rasmussen Company, Mr. A. N. Purkey, witnessed part of the conversation in regard to the transaction aforesaid and also testified as to how such transactions were handled on the books of the company. He stated that in such a transaction a check would be made out and charged to the cost of the particular automobile which was being brought back. He remembers that as a result of the conversation, arrangements were made for him to give them a check for \$25.00, the instructions being given by either Mr. Naylor or Mr. Rasmussen. He then issued the check and gave it to Mr. Dalton (R. 49-50). Mr. Purkey further testified that regular employees on a salary and commission basis who performed the same service were paid money in addition to their salary and that any additional expenses incurred and which they paid out of their pockets would be reimbursed (R. 51). Furthermore, Mr. Purkey remembers that a bill for gas and oil was found in the pocket of plaintiff and that this bill was paid by the Wayne Rasmussen Company (R. 52). At (R. 63) Mr. Purkey testified as follows:

“Q. All of these car transactions, deals like this, were — Do I understand you right, that they were all handled exactly the same.

- A. Yes. It made no difference whether Porter and Dalton went after a car or Metheny and Hansen, or any of the other employees. It was so much plus expenses and that would be added to the cost of the car."

In answer to questions by the referee the plaintiff testified as follows (R. 42):

"Q. Just one or two questions, Mr. Dalton. Was anything said about whether or not you should account for this \$25.00 after you returned?

- A. It was said that if we had any additional expense we would be reimbursed for it and anything we needed to charge to Wayne Rasmussen Company.

Q. I see.

- A. And we'd be reimbursed for it.

Q. So the \$25.00 you received was for the bus tickets and the balance was for you and Mr. Porter personally?

- A. Well, yes."

Mr. Purkey also testified that in regard to such transactions as the one involved in this case, the payment to the person involved was always a cash transaction and was never handled by debits and credits (R. 61, 62).

Approximately one year after the hearing, the referee rendered recommended findings of fact and conclusions of law which were adopted by the Industrial Commission on October 9, 1957 (R. 71, 72). In said findings the referee stated in part as follows (R. 72):

"The applicant and his partner were approached by Mr. Naylor, the sales manager of the defendant, requesting the applicant and his partner to go to Rock Springs, Wyoming, and return with two cars for the defendant. The applicant and his partner, Mr. Porter, agreed to go. They were to receive \$25.00 for the trip, out of which would come the expense of two bus tickets to Rock Springs. The defendant paid for all gas and oil and would reimburse the applicant for any money spent on repairs of the two cars.

"The applicant left on the bus according to instructions given him by the defendant's agent, arrived in Rock Springs that same evening, picked up the cars according to the instructions, and on the return trip on February 13, 1955 the applicant lost control of the car as a result of icy roads and the resultant crash caused his injuries.

"The principal issue is whether or not the applicant was employed by the defendant. It appears to the Referee that the status of employment must exist. The record shows that the above procedure was regularly followed by the defendant in sending their full time salesman on such trips so the type of work was not casual or unusual for the defendant. It could not be in the nature of a joint venture since the applicant had no interest in the property as the result of the sale. It appears that his only interest was in returning with the cars as requested and taking as his wage the difference between \$12.50 and the price of the bus tickets. Assuming \$3.00 as the price of the bus ticket, the applicant was earning at least \$9.50 per day for his work. * * *

"It was not unreasonable to find that the applicant was in fact an employee of the defendant

on February 13, 1955, and that the accident on the highway arose out of or in the course of his employment.”

Subsequent to this, on November 12, 1957, counsel for defendant wrote a letter to Mr. Otto A. Wiesley, Chairman of the Industrial Commission requesting a re-hearing. Counsel requested the re-hearing to re-determine the question of whether or not there was a contract of employment existing between defendant and the applicant. Also, counsel requested a re-hearing to determine if the medical expenses incurred by the applicant were reasonable (R. 77). On November 26, 1957, the Industrial Commission granted the request for re-hearing of defendants. Plaintiff resisted the granting of the re-hearing and on December 5, 1957, the chairman of the Industrial Commission sent a letter to counsel for plaintiff (R. 81). In this letter the chairman stated as follows:

“We acknowledge receipt of your Argument in Opposition to Rehearing.

“We have read the transcript. There is no evidence regarding medical and hospital expenses. As usual the order specifies reasonable medical and hospital expenses. Always these expenses must be in line with our established fee schedule. Therefore, usually, there is no dispute. In this case a very large bill has been submitted to the defendants. *They are entitled to have the commission determine this issue.*

“The case will be set for rehearing early in January.”

The rehearing was held on February 10, 1958. At this hearing the only proceedings held had to do with the introduction of medical bills. There was no further evidence introduced regarding the employment question. However, the defendants submitted a written argument which dealt exclusively with the employment question (R. 101-110) and plaintiff submitted a written argument in answer to the one submitted by defendants (R. 11-119). On April 2, 1958, the Industrial Commission rendered a decision (R. 96). In this decision the Industrial Commission reversed its former holding and stated in part as follows:

“The \$25.00 paid to applicant and his partner, was, we believe, expense money rather than wages. In all respects, this case is on all fours with the Oberhansly case. Therefore, we hold that Oberhansly vs. Travelers Insurance Co., 295 P. 2d 1093, 5 Utah 2d 15 is controlling.

“We therefore find that applicant was not an employee of defendant, Wayne Rasmussen Company on February 13, 1955, the date of the accident and injury, but that he was either a volunteer or an independent contractor.

“IT IS THEREFORE ORDERED that the application is denied.”

The Plaintiff submitted a petition for rehearing on April 23, 1958, (R. 97-100) which was denied by the Industrial Commission on July 17, 1958 (R. 126).

Plaintiff is appealing from the arbitrary action taken by the Industrial Commission reversing its prior ruling on plaintiff's claim with no additional evidence having been taken.

STATEMENT OF POINTS

POINT I.

THE REVERSAL OF ITS OWN FINDINGS BY THE INDUSTRIAL COMMISSION WAS ARBITRARY, CAPRICIOUS AND AGAINST LAW.

POINT II.

THE ACTION TAKEN BY THE INDUSTRIAL COMMISSION EXCEEDED THE PURPOSE FOR WHICH THE RE-HEARING WAS GRANTED.

ARGUMENT

POINT I.

THE REVERSAL OF ITS OWN FINDINGS BY THE INDUSTRIAL COMMISSION WAS ARBITRARY, CAPRICIOUS AND AGAINST LAW.

It is well established law in Utah that the question of whether or not an applicant is an employee is jurisdictional, and, therefore, the Supreme Court is required to examine the evidence to see whether or not it preponderates against the conclusions of the Industrial Commission. See *Christean v. Industrial Commission*, (1948), 113 U. 451, 196 P.2d 502, and *Sommerville v. Industrial Commission* (1948), 113 U. 504, 196 P.2 718.

The action taken by the Industrial Commission in the case at bar strikes at the roots of the Workmen's Compensation Laws and is violative of the general philosophy pertaining to said laws as stated by Justice Wolfe in the case of *Christean v. Industrial Commission*, (1948), *supra*, at page 517.

“It may be pertinent here to repeat the now familiar principle that the Workmen’s Compensation Act should be liberally construed to accomplish the beneficent purposes of the act. In close or doubtful cases that construction should be applied which includes rather than excludes particular classes of employees from the benefits of the act.”

Certainly if the foregoing language is to be given any meaning whatsoever in this State the action taken by the Industrial Commission in the case at bar must be disapproved. After having the case under advisement for almost a year the referee made specific findings of fact (1) that since the procedure involved in this case was regularly followed by the defendant in sending out its full time salesmen on such trips that the type of work was not casual or unusual for the defendant; (2) that the trip could not be in the nature of a joint venture since the applicant had no interest in the property as the result of the sale and, (3) that applicant and his partner were paid a wage for the services which they performed which consisted of \$12.50 less the price of a bus ticket which amounted to at least \$9.50 per day for the work, with the resulting conclusion that the applicant was an employee of defendant at the time of the accident. The Industrial Commission then went on to grant a re-hearing in the case upon a request by counsel for defendants to re-determine the question of employment without said counsel stating any specific reason whatsoever. Without taking any additional evidence at the re-hearing as to the

question of employment the Industrial Commission arbitrarily changed its finding that the applicant was performing a service for a wage to a finding that the \$25.00 paid to applicant and his partner was expense money rather than wages. The only justification that the Industrial Commission attempted for this arbitrary action was that it asserted that the case at bar was on all fours with the case of *Oberhansley v. Travelers Insurance Company*, 5 U. 2d 15, 295 P. 2d 1093. It appears that the Industrial Commission changed a finding of fact on the basis of the facts and law of an entirely different lawsuit.

The case at bar is entirely distinguishable from the Oberhansley case. In the Oberhansley case the plaintiff recovered a judgment from the owner of an automobile business for injuries received when riding in a car driven by said owner. The plaintiff then sued the insurance company to collect on the owner's liability policy and the insurance company contended that plaintiff was excluded from the policy for the reason that he was an employee under Workmen's Compensation Law. The plaintiff's brother was a partner in this automobile business, and the evidence showed that the business was in financial difficulty. The plaintiff had delivered automobiles for the company on other occasions, and it was admitted by all parties involved that on the other occasions as well as on the one in question the plaintiff was rendering a service merely as a favor and a gratuity. Furthermore, it was admitted by all parties that the \$10.00 which the plaintiff received was merely expense money and that it

was understood as such. The trial Court held from this evidence that there was no employee-employer relationship between the automobile company and the plaintiff. The Supreme Court affirmed the holding of the trial court mainly on the basis that the trial court had held there was no consideration paid to plaintiff for the service which he rendered. The court appeared to rely on this fact as a basis for affirming the finding that the automobile company did not have the right to control the plaintiff in the manner in which the work was accomplished. It was further pointed out that the plaintiff had a motive for desiring to perform the service as a favor for the reason that his brother was a partner in the business and that the business was in financial difficulty. The Oberhansley case involved a situation where the Supreme Court held that once having found that the service rendered was a gratuity, it was reasonable for the trial court to hold that the plaintiff was not an employee. The Industrial Commission in the case at bar used the Oberhansley case not as a precedent for a legal conclusion but as the basis for reversing its own findings of fact that the plaintiff had rendered the service not as a gratuity but for a wage.

The evidence in the record in the case at bar establishes overwhelmingly the fact that the plaintiff and his partner were performing the service involved for a wage and not as a gratuity. Not only did the parties involved in the transaction in question testify that the only thing that had to come out of the \$25.00 was a bus ticket and that any additional expenses would be reimbursed, but

the bookkeeper testified that in all transactions such as this the person involved was given so much money plus expenses. When questioned by counsel for defendants on cross examination the bookkeeper stated that the same formula was used for regular employees performing this service the same as it was used for Dalton and Porter. There was no evidence put in the record to contradict in any way the inescapable conclusion that plaintiff and his partner performed the service for the money that would remain after the bus tickets were purchased. Any other finding based on this record would have been utterly ridiculous. There was nothing whatsoever shown in the case at bar indicating that plaintiff and his partner had any motive for desiring to give defendant a gratuity and for desiring to undertake an onerous burden of taking a bus trip to Rock Springs, Wyoming and spending half the night driving back to Ogden over a weekend for no remuneration. There was nothing shown in the record that plaintiff had such a great love and devotion for the Wayne Rasmussen Company that he would desire to undergo such a hardship for no money at all. It seems peculiar that the Industrial Commission would attribute such a noble and generous motive to plaintiff for the purpose of denying compensation, especially when there was nothing in the record showing that plaintiff is such a big hearted person.

The Industrial Commission in its final decision would not even attempt to state definitely what it did consider the plaintiff to be, but stated equivocally that he was either a volunteer or an independent contractor. In its

first ruling on this case the Industrial Commission held that plaintiff was neither a volunteer nor an independent contractor and appeared to rely heavily on the fact that the procedure followed by plaintiff was a procedure regularly followed by defendant in sending out its full time salesmen.

In arguing whether or not Wayne Rasmussen Company had the right of controlling plaintiff in the performance of this service it seems obvious that it had the same right of control over plaintiff that it had over its full time employees who performed similar services as an integral part of its business. It would be very difficult to hold that defendant had the right of control in one case and not the other. It is difficult to see how anyone could argue that the Wayne Rasmussen Company did not have the right to control the performance of the services. The Wayne Rasmussen Company owned the automobiles and gave plaintiff and his partner definite instructions where to go, when to go, who to see, and to drive the automobiles back to the Company after they were obtained. Certainly the type of service which plaintiff was rendering was not one requiring an unusual degree of skill which is the case of most independent contractors. Obviously the plaintiff and his partner had no right to substitute anyone else for themselves such as most independent contractors have. It will be remembered that the testimony showed that Wayne Rasmussen Company was relying on the reliability of plaintiff and his partner with which it was well acquainted. This was

not the type of work which has no connection with the business and which is usually done by outside parties, but on the contrary was a regular and vital function of the business of Wayne Rasmussen Company. It seems quite obvious that an automobile dealer cannot function without having automobiles to sell. The fact that the job which Dalton and Porter were doing was one which was regularly and most usually performed by regular employees for a wage should be determinative of the question of employment, for it would be difficult to argue that had one of the regular employees been injured as was Dalton that he would not be considered an employee under Workmen's Compensation.

For assistance to the court the following cases are cited to substantiate some of the legal propositions heretofore stated. See *Ludlow v. Industrial Commission*, 65 U. 168, 235 P. 884, and *Gogoff v. Industrial Commission*, 77 U. 355, 296 P. 229, for the proposition that an employee cannot put another person in his place without the consent of the employer whereby an independent contractor can.

The applicant was held to be an employee and not an independent contractor in the case of *Southern Pacific Company v. Industrial Commission*, 71 U. 248, 264 P. 965, where the applicant was hired by the railroad company's section foreman to cut noxious weeds on a section of the company's right of way in Weber County. The applicant was to furnish his own team and mower and was hired at a daily wage of \$6.50. He was instructed

where to cut the weeds and when to change to other places. Also, it was pointed out that no one told applicant how to operate the team and mower.

The case of *Utah Fire Clay Company v. Industrial Commission*, 86 U. 1, 40 P. 2d 183, involved a situation where the employer entered into an oral contract with R. S. James to furnish trucks and drivers to do all of his transportation and delivery service. James furnished two trucks and drivers who reported daily to the shipping clerk of the company, and deliveries were made under his direction. The court held in this case that the truck drivers were employees of the company under the Workmen's Compensation statutes. It seems difficult to distinguish these latter two cases from the case at bar in regard to the right of control test or any of the other tests spoken of by the court in various cases.

Although it appears from the Industrial Commission's latest decision that no assertion was made to the effect that plaintiff was a casual employee as spoken of in Section 35-1-43 Utah Code Ann. 1953, it seems advisable to discuss this aspect of the case briefly due to the fact that defendant has contended, among other things, that plaintiff was such a casual employee.

In the case of *Palle v. Industrial Commission of Utah*, 79 U. 47, 7 P. 2d 284, it was pointed out that to exclude an employee the employment must not only be casual but must also not be in the usual course of the trade or business of the employer, and it was stated:

“This, as it seems, but emphasizes the fact that a casual or occasional employment of the usual course of the trade or business of the employer does not exclude the employee.”

And further:

“Further, the employment of Nelson to take the place of Kenneth Jensen while absent, may not be said to constitute a mere ‘casual’ employment, but was a regular employment in the business. He continued to be such an employee until he was discharged or left the service.”

It can be seen from this case that an employment, regardless of duration, if in the regular course of business cannot be a casual employment under the Workmen’s Compensation statutes, and that any employment which accomplishes the work of a regular employee who is unable to work is not a casual employment.

In *Utah Copper Co. v. Industrial Commission*, 57 U. 118, 193 P. 24, the deceased was a farmer operating a farm through which a canal ran. The water was used for irrigation and stock and was owned by a canal company. However, Utah Copper Company used water from the canal the year around in mining and milling processes. The Utah Copper Company kept the canal clean and in repair and frequently hired local men for repair work. With the authority of the company the canal boss hired the decedent for certain repair work in which work he received his injury. It was held that obtaining water was necessary to the business of the copper company and anyone repairing the ditch was, therefore, engaged in the

usual business of the employer and that, furthermore, it was not casual employment. It was stated at page 29:

“The intent of the legislation in question was to create a new or additional burden upon the industries of this state not heretofore borne by such industries, and to establish a system whereby the industries should bear the cost of providing for those injured while engaged in such industries or the dependents of those sustaining injuries resulting in death. Such being the object sought, it is, in our judgment, more in consonance with that purpose to conclude that it was not the intention of the Legislature to exclude from the operation of the act any one engaged in work necessarily required in the usual prosecution of such industries, and that the duration of such employment or the infrequency of the same ought not to control the courts in determining whether the employment was casual or otherwise. If the employment was essential and was required in the prosecution of the regular business of the industry, the industry, in order to carry out and effectuate the purpose of the act, should pay for any injuries sustained. The statutes of this state require the courts to give to legislative enactments a liberal construction, with a view to effectuate the purpose sought by the Legislature.”

In the case of *Capitol Cleaners and Dyers v. Industrial Commission*, 85 U. 295, 39 P. 2d 681, the defendant operated a business of cleaning and dyeing of wearing apparel, and decided for reasons being conducive to the accomplishment of its purposes and to promote its business to have a smokestack and certain radiators and pipes

painted. The defendant hired the deceased to do it on an hourly wage with tools and supplies furnished by the company. In all respects except as to the actual mechanics of the painting the work was to be done under the supervision and subject to the direction of the employer. Furthermore, the deceased had done the same type of work for the company before under similar arrangements. It was held at page 682:

“The work to be accomplished being in furtherance of and necessary to the business in which the company was engaged, the employment was not casual within the meaning of R. S. Utah 1933, 42-1-41. Since the work was to have been done under the supervision and subject to the direction of the employer, Mr. Reusser, with respect thereto, was not an independent contractor within the intent and meaning of R.S. Utah 1933, 42-1-40.”

In regard to the general question of employee-independent contractor, a recent case which may be of assistance to the court is the case of *Plewe Construction Company v. Industrial Commission* (1952), 121 U. 375, 242 P. 2d 561. In this case a general contractor constructing a building hired partners to shingle the roof for so much a square. The contractor instructed the partners as to how the work was to be done, furnished the material and supervised the work. The partners hired a carpenter to help them, and the carpenter was injured in this work. It was held that the carpenter was the employee of the contractor under the Workmen's Compensation Law.

It is respectfully submitted that the Industrial Commission acted arbitrarily and capriciously in reversing former findings of fact based on the entire evidence in the record on the sole ground of the Oberhansley case which has an entirely distinguishable fact situation as heretofore pointed out.

POINT II.

THE ACTION TAKEN BY THE INDUSTRIAL COMMISSION EXCEEDED THE PURPOSE FOR WHICH THE RE-HEARING WAS GRANTED.

As pointed out in the Statement of Facts herein it was agreed between the parties and the referee at the time of the first hearing that the hearing would be devoted exclusively to the question of whether or not the plaintiff was an employee. It was agreed at that time that there would probably be no dispute as to the medical bills and wage benefits should plaintiff receive an award. As previously stated, subsequent to the first decision of the Industrial Commission granting benefits to plaintiff, counsel for defendants sent an ex parte letter to Otto A. Wiesley, the chairman of the Industrial Commission, in which he requested a re-hearing to re-determine whether or not there was a contract of employment existing between the defendant Wayne Rasmussen Company and the applicant, Sherman S. Dalton, at the time of the injury and also to determine if the medical expenses incurred by the applicant were reasonable. When the Industrial Commission granted the re-hearing, counsel for plaintiff objected for the reason he had been given no

notice and had not been given an opportunity to submit an argument opposing the granting of the re-hearing and had been denied due process of law (R. 75). Subsequently, counsel for plaintiff also submitted an argument in opposition to the re-hearing on the two grounds as stated in the letter of counsel for defendant and especially in regard to the employment question, for the reason that the matter had been thoroughly studied by the referee for almost a year before the decision was rendered (R. 79-80).

In response to this argument in opposition of re-hearing, counsel for plaintiff received a letter dated December 5, 1957, from the Industrial Commission of Utah and signed by its chairman, Otto A. Wiesley. This letter stated as follows:

“We acknowledge receipt of your Argument in Opposition to Re-hearing.

“We have read the transcript. There is no evidence regarding medical and hospital expenses. As usual the order specifies reasonable medical and hospital expenses. Always these expenses must be in line with our established fee schedule. Therefore, usually, there is no dispute. In this case a very large bill has been submitted to the defendants. They are entitled to have the commission determine this issue.

“The case will be set for rehearing early in January.”

Certainly, even a casual reading of this letter shows that the Industrial Commission was informing counsel that the re-hearing was granted for the sole purpose of establishing the reasonableness of the medical bills. As previously stated, the re-hearing was subsequently held and was limited to evidence as to the reasonableness of the medical bills. The Industrial Commission then proceeded in its subsequent decision to arbitrarily reverse its former findings of fact and decision without having taken any new evidence whatsoever and after having the original hearing under advisement for almost a year.

It is respectfully submitted that the Industrial Commission granted the re-hearing for the sole purpose of considering the reasonableness of the medical bills. The Industrial Commission had no jurisdiction to then re-open the question of employment which had been finally and definitely decided.

It is respectfully submitted that to allow the Industrial Commission to grant a re-hearing for certain purposes and then allow said Commission to open up the re-hearing and reconsider other matters would be grossly unfair to litigants and would give the Industrial Commission unlimited power to act arbitrarily and capriciously as it did in the case at bar. Certainly, the rules of procedure should be definite and certain so that applicants and their attorneys may rely on final decisions made by the Industrial Commission and not be subject to having the rug pulled out from under them.

CONCLUSION

The Industrial Commission has the duty to administer the Workmen's Compensation Laws fairly to effectuate the "beneficent purposes of the Act." The only protection a claimant has against arbitrary and capricious action of the Industrial Commission is an appeal to this Court. This Court is urged to intervene when the Commission attempts to become a law unto itself. When the Industrial Commission attempts to establish its own empire and its own law contrary to the beneficent purpose of the Act, its actions should be stricken down.

Such arbitrary, highhanded and illegal treatment as plaintiff received at the hands of the Industrial Commission should not be tolerated. After taking a full year to arrive at a decision awarding compensation to plaintiff, the Commission suddenly, arbitrarily and illegally reversed itself and took away plaintiff's rightful award. This action was taken without new evidence or new law but solely on the basis of the peculiar facts of a different lawsuit. The Commission even exceeded its own stated purpose in granting the rehearing by considering the employment question. This question had been finally determined and the rehearing for such question denied. The Commission had lost jurisdiction of the question of employment and had no power to arbitrarily open it up again and reverse former findings.

It is respectfully submitted that the action taken by the Industrial Commission in this case should be stricken down and plaintiff given his rightful award.

Respectfully submitted,

JOHN L. BLACK

Attorney for Plaintiff