

1958

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

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.

Ray, Quinney & Nebeker; Grant C. Aadnesen; Stephen B. Nebeker; Attorneys for Defendants and Respondents;

Recommended Citation

Brief of Respondent, *Dalton v. Industrial Comm. Of Utah*, No. 8943 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3179

This Brief of Respondent 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.

IN THE SUPREME COURT
of the
STATE OF UTAH

SHERMAN S. DALTON,

Plaintiff and Appellant, Clerk, Supreme Court, Utah

vs.

INDUSTRIAL COMMISSION OF UTAH
WAYNE RASMUSSEN COMPANY, and
GUARANTEE INSURANCE COMPANY
Defendants and Respondents.

FILED

DEC 16 1958

Case No.
8943

BRIEF OF RESPONDENT

RAY, QUINNEY & NEBEKER,
GRANT C. AADNESEN,
STEPHEN B. NEBEKER

*Attorneys for Defendants
and Respondents*

INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	7
ARGUMENT	7
POINT I. APPELLANT WAS A VOLUNTEER OR AN INDEPENDENT CONTRACTOR	7
POINT II. THE INDUSTRIAL COMMISSION GRANT- ED THE REHEARING FOR THE EXPRESS PURPOSE OF REDETERMINING THE EMPLOY- ER-EMPLOYEE RELATIONSHIP AND REASON- ABleness OF THE MEDICAL EXPENSES	26
CONCLUSION	30

AUTHORITIES CITED

Cases Cited:

Angel v. Industrial Commission, 64 Utah 105, 228 P. 509	21
Bingham City Corp. v. Industrial Commission, 66 Utah 390, 243 P. 113	11
Camacho v. Industrial Commission, 119 Utah 181, 225 P.2d 728	8
Carter v. Industrial Commission, 76 Utah 520, 290 P. 776	29
Christean v. Industrial Commission, 113 Utah 451, 196 P.2d 502 ..	21
Commission of Finance v. Industrial Commission, 121 Utah 83, 239 P.2d 185	8
Ferguson v. Reynolds, 52 Utah 583, 176 P.267	18
Fox v. Lavender, 89 Utah 115, 56 P.2d 1049	16
Gogoff v. Industrial Commission, 77 Utah 355, 296 P. 229	21
Kinder v. Industrial Commission, 106 Utah 448, 150 P.2d 109	20
Luker Sand & Gravel Co. v. Industrial Commission, 82 Utah 188, 23 P.2d 225	21
McFarlane v. Winters, 47 Utah 598, 155 P. 437	18
Oberhansly v. Travelers Ins. Co., 5 Utah 2d 15, 295 P.2d 1093	8

	<i>Page</i>
Parkinson v. Industrial Commission, 110 Utah 309, 172 P.2d 136	15
Pinyon Queen Mining Co. v. Industrial Commission, 59 Utah 402, 204 P. 323	29
Plewe Construction Company v. Industrial Commission, 121 Utah 375, 242 P.2d 561	25
Southern Pacific Co. v. Industrial Commission, 71 Utah 248, 264 P. 965	24
Stover Bedding Co. v. Industrial Commission, 99 Utah 423, 107 P.2d 1027	13
Utah Fire Clay Co. v. Industrial Commission, 86 Utah 1, 40 P.2d 183	24
 Statutes Cited:	
Section 35-1-42, Utah Code Annotated, 1953	14
Section 35-1-82, Utah Code Annotated, 1953	29
Section 35-1-85, Utah Code Annotated, 1953	7
 Texts Cited:	
A.L.I. Restatement of Agency, Section 220	21

IN THE SUPREME COURT of the STATE OF UTAH

SHERMAN S. DALTON,
Plaintiff and Appellant,

vs.

INDUSTRIAL COMMISSION OF UTAH
WAYNE RASMUSSEN COMPANY, and
GUARANTEE INSURANCE COMPANY
Defendants and Respondents.

Case No.
8943

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Plaintiff was injured in an automobile accident which occurred on February 13, 1955, while he was driving a car from Rock Springs, Wyoming to Ogden, Utah, for the Wayne Rasmussen Company. Thereafter he filed a claim with the Industrial Commission of Utah for benefits under the Workmen's Compensation Statutes. The first hearing was held before the Industrial Commission on October 17, 1956. At that hearing it was stipulated

between the parties that the sole issue to be determined was whether or not there was a contract of employment existing between the Defendant, Wayne Rasmussen Company, and the plaintiff, Sherman S. Dalton. (R. 11). On October 9, 1957, plaintiff's recommended findings of fact and conclusions of law were adopted by the Industrial Commission. (R. 71, 72, 73). The Commission found that the plaintiff was an employee of the defendant and the accident which resulted in plaintiff's injuries arose out of or in the course of his employment. (R. 72). On November 12, 1957, defendant filed a petition for rehearing to redetermine the question of whether or not there was a contract of employment existing between the plaintiff and defendant and to determine if the medical expenses incurred by the applicant were reasonable. (R. 77). On November 26, 1957, the Commission ordered that the application for rehearing be granted. (R. 78). The rehearing was held on February 10, 1958. On April 2, 1958, the Commission reversed its former holding and found that the plaintiff was not an employee of the Wayne Rasmussen Company, but was either a volunteer or an independent contractor. The Commission entered the following decision:

"The above entitled cause came on regularly for hearing at Salt Lake City, Utah, on October 17, 1956 at 10:00 o'clock A.M., before the Industrial Commission of Utah, pursuant to Order and Notice of the Commission. Applicant was present and represented by John L. Black, attorney; defendants were present and represented by Grant C. Aadnesen, attorney.

A further hearing was held at Salt Lake City, Utah, on February 10, 1958, at 9:00 o'clock A.M.

The attorneys above mentioned represented the parties.

On October 9, 1957 the Commission made an award in favor of applicant. Subsequently, defendants filed a Petition for Rehearing which was granted by formal Order of the Commission on November 26, 1957. It was stipulated that the transcript of the first hearing should be made a part of the record on rehearing.

Two issues were submitted on rehearing, first, whether or not the applicant was an employee of defendant, Wayne Rasmussen Company on February 13, 1955, and, second, the reasonableness of the medical and hospital bills submitted to defendants for payment. The second issue was not considered at the first hearing.

We have carefully reviewed the testimony submitted at the first hearing and studied the memoranda filed by counsel.

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 v. 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." (R. 96).

Plaintiff filed a petition for rehearing on April 23, 1957 (R. 97). This petition was denied by the Industrial Commission on July 17, 1957 (R. 126).

In view of the rule that the decision of the Commission will not be disturbed if supported by any substantial evidence, and in order to assist the court, we feel it necessary to restate the facts of the case.

Dalton and a Mr. Porter owned and operated an automobile parts and body shop. Although they leased the back part of a building owned by the Wayne Rasmussen Company, they operated their business entirely independent of the Wayne Rasmussen Company.

Wayne Rasmussen Company held the Studebaker franchise in Ogden, Utah. Part of the business of the Wayne Rasmussen Company was buying and selling used cars. (R. 46). When the new car business slowed up a little, Wayne Rasmussen Company would buy used cars in Idaho, Wyoming, New Mexico or Arizona and bring them back to Utah. (R. 47). The cars were driven to Utah by various people. (R. 48). Purkey, office manager and bookkeeper for Wayne Rasmussen Company and the Porter Dalton partnership, testified:

"Q. Do you know what people were used, in the past to obtain these cars and drive them back?

A. Well, we had a Mr. A. J. Hansen and Scotty Metheny. They had been there for several years with Mr. Rasmussen as salesmen and, if the business slowed up a little, in the new business, then we went out and tried to pick up something to make some money in the used car business and sometimes they would buy them themselves and bring them back or get somebody to help them bring them back. Then there would be other times that Mr. Rasmussen would go and bring them, and sometimes Metheny and Hansen would go pick

them up or take someone with them to pick them up.

Q. And do you know of any other employees, other than the two you have mentioned, that were ever sent to bring cars in?

A. Well no, other than Mr. Dalton and Mr. Porter.

Q. On this occasion that we have talked about today?

A. Yes, then we had others, that I can't remember their names. They were short-term employees, see." (R. 46, 47, 48)

On or about February 11, 1955, Naylor, the Sales Manager for Wayne Rasmussen Company, approached Dalton and asked him if he and his partner, Porter, could go to Rock Springs, Wyoming, to drive two cars back to Ogden, Utah (R. 16). Naylor told Dalton he had a "deal" with somebody to get the cars but that they weren't going to go and that it had caused an emergency (R. 16). Purkey who was present during the conversation between Naylor and Dalton relative to picking up the cars, testified:

"Mr. Naylor had these two cars up there and he thought that he had some other parties to go get them. Well, I believe it was Friday afternoon or Saturday morning, I can't remember which, that these other parties called him up and said they couldn't go. So Mr. Naylor was worried about who he could get and I believe that Jack came up, Mr. Dalton came up into the parts or to the front of the office and Mr. Naylor told him that he had these two cars there, and Mr. Dalton said, "*Well, we will go get them.*" I don't remember just when that was, whether that was Friday or Saturday, but

anyway the arrangements was made that they should go get them and I was to give them a check for \$25.00." (R. 49-50). (*Italics ours*)

On Saturday, February 12th, Dalton told Naylor that he and his partner could go get the cars. (R. 17). Naylor made arrangements for transportation by bus to Rock Springs because it was Saturday morning and Dalton was too busy to get away and make the arrangements. (R. 17). Naylor told Dalton the departure and arrival time of the bus, where the garage in Rock Springs was located, to have the cars filled with gas and to charge it to Wayne Rasmussen Company, and if they had any trouble on the way to pay for it and they would be reimbursed for the money spent. (R. 18). Naylor gave Dalton a check for \$25.00 (R. 18). Dalton bought the bus tickets out of the \$25.00 for himself and Porter. (R. 18). Dalton and Porter caught the bus in Ogden, Utah, at 2:00 or 3:00 p.m. on Saturday afternoon. They arrived in Rock Springs at 7:00 p.m. that night, and went to the garage where the cars were located. (R. 19, 20). Dalton signed the tickets for the gasoline which had been put in the cars and then he and Porter went to a cafe to eat. (R. 20). After they finished eating Dalton and Porter started for Ogden, each driving a separate car. Somewhere between Rock Springs and Evanston, Wyoming, they had a quart of oil put in one of the cars (R. 38). When they arrived in Evanston they stopped at the Freeman Hotel and had a cup of coffee and rested a few minutes, and then proceeded on to Ogden (R. 20). About 18 miles west of Evanston the plaintiff's car hit some ice on the road, went into a spin and sideswiped a telephone pole, which resulted in plaintiff's injuries.

STATEMENT OF POINTS

POINT I

APPELLENT WAS A VOLUNTEER OR AN INDEPENDENT CONTRACTOR.

POINT II

THE INDUSTRIAL COMMISSION GRANTED THE REHEARING FOR THE EXPRESS PURPOSE OF REDETERMINING THE EMPLOYER-EMPLOYEE RELATIONSHIP AND REASONABLENESS OF THE MEDICAL EXPENSES.

ARGUMENT

POINT I

APPELLANT WAS A VOLUNTEER OR AN INDEPENDENT CONTRACTOR.

Section 35-1-85 of the U.C.A. 1953, states:

35-1-85. Duty of commission to make findings of fact and conclusions of law—Filing—Conclusiveness on questions of fact—Review—Court judgment.—After each formal hearing, it shall be the duty of the commission to make findings of fact and conclusions of law in writing and file the same with its secretary. *The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission.* The commission and every party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the court shall enter judgment either affirming or setting aside the award. (Italics ours)

Under this section and the rule often enunciated by this Supreme Court, the findings and conclusions of the Commission should be sustained where there is substantial evidence to support them. *Commission of Finance v. Industrial Commission*, 121 Utah 83, 239 P.2d 185; *Camacho v. Industrial Commission*, 119 Utah 181, 225 P.2d. 728.

In the case at bar the commission made the following findings and conclusions:

“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 v. 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.” (R. 96)

Plaintiff has assailed the findings and conclusions of the Commission. Although they are binding on this court, we will discuss them to show that Dalton was a volunteer and even if he was not a volunteer, he must of necessity have been an independent contractor.

The case at bar is controlled by *Oberhansly v. Travelers Insurance Company*, 5 Utah 2d 15, 295 P.2d 1093. In that case the plaintiff, Verne J. Oberhansly, obtained a judgment against LaMar Pearce and LaMar Pearce Auto Mart, a corporation, for personal injuries sustained while riding in a car driven by LaMar Pearce, president of the LaMar Pearce Auto Mart. Being unable to collect the judg-

ment because of the involency of both LaMar Pearce and the company, Oberhansly brought suit to collect it from Travelers Insurance Company. Travelers had issued its standard comprehensive liability policy which was in force at the time of the accident to the LaMar Pearce Auto Mart. Judgment in the lower court was for the plaintiff and the defendant appealed. Travelers attempted to avoid its liability under the policy on two grounds:

“(1) That respondent was an employee of the LaMar Pearce Auto Mart, or was such under the provisions of the Workmen’s Compensation Act of this state and therefore expressly excluded under the terms of the policy, and (2) that the insured failed to cooperate with the insurer in defense of the action against it in violation of the terms of the policy.”

The court stated as to point No. 1 (P. 1094):

“As to No. 1, the evidence was uncontradicted that respondent was regularly engaged in a business of his own in no way connected with the LaMar Pearce Auto Mart, but that respondent’s brother was connected with the company under what LaMar Pearce called a partnership agreement, and therefore on a few occasions before the occurrence of the accident on which this suit is based, had, as a favor to this brother, driven cars to Idaho for the company and had neither asked nor received compensation or even expenses for those trips. The company was in financial difficulties and on the day the accident occurred, respondent was called and asked if he would drive one of two cars which the company had decided to return to a consignor in Evanston, Wyoming. He consented to do so if the expenses were paid by the company and LaMar Pearce gave him \$10 for this. The \$10

was spent for gasoline for all the cars driven on this trip and for meals and refreshments. LaMar Pearce testified that although he had never exercised any control over the activities of respondent on the few occasions when he had delivered cars for the company, he felt that if he had seen him drive in a manner which could result in damage to the car being returned he could tell him not to do so as the cars were his responsibility. Although the company maintained Workmen's Compensation insurance, respondent was not reported as an employee on any reports concerning its employees. From this evidence the court found that respondent was not an employee of the insured at the time of the accident within the meaning of that word as used in the policy, nor was the insured liable under any Workmen's Compensation law for the injuries received by respondent. We agree with the court's findings. The evidence is conclusive that neither LaMar Pearce, who was representing the company, nor respondent understood that respondent had been hired to drive the car to Evanston, Wyoming. The act was considered by all parties concerned to be a voluntary accommodation. Pearce did not have the right to direct respondent in the manner in which he wished the work to be accomplished. He could not discharge him for a refusal to do as directed. There was no agreement to pay wages or salary. The \$10.00 was given for expenses and not as compensation for work."

The facts in the case at bar are on all fours with the facts of the Oberhansly case.

In the Oberhansly case the respondent was asked to drive a car to Evanston, Wyoming, because the company

was in financial difficulty. In the case at bar the plaintiff volunteered (R. 49) or was asked (R.16) to drive a car from Rock Springs, Wyoming to Ogden, Utah, because of an emergency. In both cases the driving was done as a voluntary accommodation. In both cases the individuals volunteering to drive the cars were regularly engaged in a business of their own. In both cases the individuals doing the driving were not reported as employees of the companies for whom they were driving (R. 53-54). In the Oberhansly case, Pearce, the president of the Auto Mart, did not have the right to direct Oberhansly in the manner in which he wished the work to be accomplished. Pearce could not discharge Oberhansly for refusal to do as directed. There was no agreement for Pearce to pay Oberhansly a salary or wage. In the case at bar, neither Rasmussen nor Naylor had the right to direct Dalton in the manner in which he wanted the driving to be done. Neither Rasmussen nor Naylor could discharge Dalton for refusal to do as directed and there was no agreement to pay wages or salary. In the Oberhansly case the \$10.00 given to Oberhansly was given for expenses and not as wages. It was spent for gasoline, meals and refreshments. In the case at bar, the \$25.00 was given for expenses and was spent for bus tickets (R. 41), meals (R. 20), refreshments (R. 20) and a quart of oil (R. 38).

In the Oberhansly case this court restated the test announced in *Bingham City Corp. v. Industrial Commission*, 66 Utah 390, 243 P. 113, to determine whether a workman is an employee:

“The usual test by which to determine whether one person is another’s employee is whether the alleged employer possesses the power to control the

other person in respect to the services performed by the latter and the power to discharge him for disobedience or misconduct. Under the Workmen's Compensation Act it is also essential that some consideration be in fact paid or payable to the employee. The purpose of the act is to provide compensation for earning power, lost in industry, and the only basis for computing compensation is the earning ability of the employee in the particular employment out of which the loss arises. *In short, the term 'employee' indicates a person hired to work for wages as the employer may direct.* * * *” (Italics ours)

The court concluded its discussion of whether Oberhansly was an employee of the LaMar Pearce Auto Mart by stating:

“It is clear from all the evidence that there was a reasonable basis for the court to find there was no employee-employer relationship between respondent and the insured either under the ordinary meaning of those terms or under the Workmen's Compensation Act and the court did not err in so finding.”

Appellant has attempted to distinguish the Oberhansly case from the case at bar on the ground that the \$10.00 given to Oberhansly was for expenses while the \$25.00 given to Dalton and Porter was for wages. Appellant would have this court believe that if any of the \$25.00 was remaining after Dalton had purchased a bus ticket, a meal, refreshments and a quart of oil that it must follow that Dalton was an employee. This court has never limited the test of the employer-employee relationship to such

a narrow premise. The test previously announced by this court to ascertain if a relationship is that of employer-employee is to determine whether the alleged employer possesses the right to control the other person in respect to the manner and method of the service performed. *Bingham City Corp. v. Industrial Commission, supra.*

The manner and basis of payment is one element to be used in determining whether there is an employer-employee relationship. *Stover Bedding Co. v. Industrial Commission*, 99 Utah 423, 107 P.2d 1027. The \$25.00 given to Dalton was for expenses. The record is silent as to what amount, if any, was left from the \$25.00 after Dalton had purchased a bus ticket, dinner, refreshments and a quart of oil. Even if there was some balance remaining from the \$25.00, that amount would not be a wage. The appellant has failed to show that the evidence preponderates against the conclusion of the Commission that the \$25.00 was to be used for expenses rather than wages. That the parties did not consider the \$25.00 as a wage is shown by Purkey's statement that the money Dalton and Porter received was not reported as income on their final statement at the end of the year. (R. 63).

Appellant has also attempted to distinguish the Oberhansly case on the ground that Oberhansly rendered a service as a favor and a gratuity while Dalton performed a service for wages. The record in the case at bar supports the finding of the Commission that Dalton rendered a service as a voluntary accommodation.

Purkey testified that when Dalton was informed that two cars were in Rock Springs he volunteered "*Well, we will go get them.*" (Italics ours) (R. 49).

This statement corroborates the Commission's finding that Dalton performed this job of his own free will.

The record does not support plaintiff's contention that Dalton's decision to go to Rock Springs to get the cars was motivated by a promise of remuneration. Porter's motive for going on the trip was given in response to a question concerning the possibility of his going to Rock Springs to purchase a used car for his own purpose. He stated:

"We went on several trips and it was easy to tell my wife we were going to look at a car if we were going to go out on a binge. And that's the truth of it." (R. 65)

It is important to observe that Porter's statement was framed in the plural and obviously included himself as well as Dalton. It is also important to note that the statement was made while Porter was being questioned as an adverse witness. This statement was given in response to a question concerning his prior statement that he went to Rock Springs to purchase a used car for his own purpose. Dalton and Porter apparently had reasons of their own for going to Rock Springs. It might have been to purchase used cars for their own purposes or "go out on a binge." From the testimony in the record, the Commission could find "that's the truth of it."

From the foregoing it is evident that both Porter and Dalton were volunteers.

Assuming, for the sake of argument, that Dalton was not a volunteer, then it must follow that he was an independent contractor and not an employee. Section 35-1-42, U.C.A. 1953, defines the terms of employee and independent contractor:

"... 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 of 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 subcontractors, shall be deemed, within the meaning of this section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. *The term 'independent contractor,' as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.*" (Italics ours)

This court has interpreted this language in a number of cases.

In *Parkinson v. Industrial Commission*, 110 Utah 309, 172 P. 2d 136, this court stated:

"From these definitions (given in 35-1-42, U.C.A. 1953) it is apparent that whether a workman is an 'employee' or an 'independent contractor' is dependent on (1) whether the employer has the right to control his execution of the work, (2) whether the work done or to be done is a part or process in the trade or business of the employer, and (3) whether the work done or to be done is a

definite job or piece of work. (The word 'employer' as used in this opinion refers to the person who is having work done, whether the person doing the work is an 'employee' or an 'independent contractor'.')

The court further held that the most important determinative of the relationship between workman and employer is that of control.

In *Fox v. Lavender*, 89 Utah 115, 56 P.2d 1049, this court applied the right to control test. The question before the court was whether a husband who was riding in a car driven by his wife and owned by them jointly had the legal right of control. It was held to be a fact question. The court stated at page 1051:

"Control as applied to the operation of an automobile may be broken down into its elements—the when, the where, and the how. Complete control means that the principal could dictate when the car was to be used, the destination or where it should go, the route it should take, and how it should be driven, whether slow or fast, behind or around traffic, inside or outside the lane of traffic, etc. It is not necessary that the principal should be physically able to so direct or control, but only that he has the right to."

The test used in the *Fox* case is the same test that should be applied in the case at bar.

The Wayne Rasmussen Company had no right to dictate when Dalton drove the car back to Ogden. He could have stayed in Rock Springs Saturday night if he had desired and returned to Ogden the next morning or even Sunday evening. If Dalton had decided not to go,

neither Naylor nor Rasmussen had any authority to order him to go. The fact that Naylor made transportation arrangements for Dalton to Rock Springs does not in any way give him the right to direct when the cars were to be returned. Assuming that Naylor had gone to Rock Springs with Dalton, he had no legal right to tell Dalton when he had to drive the car back to Ogden. The very nature of the act—driving a car from Rock Springs, Wyoming to Ogden, Utah—was the kind of a job which indicates that Dalton, and not the Wayne Rasmussen Company, had the right to determine when he returned to Ogden.

The company did not have the legal right to direct Dalton where to drive the car. Dalton testified that there was only one highway going west out of Rock Springs and that was U.S. #30 (R. 20). Assuming that there were a number of routes from Rock Springs to Ogden, the Wayne Rasmussen Company had no legal right to tell Dalton which one he should take. Dalton was to bring a car back to Ogden, Utah. *He* had the right to determine the route, *not* the Wayne Rasmussen Company. (Italics ours). See *Parkinson v. Industrial Commission*, *supra* (where this Court held there was no right to direct route of travel where there was only one direct route available).

The company had no right to direct Dalton in the manner in which he drove the car. Dalton had the right to determine how he drove the automobile, "whether slow or fast, behind or around traffic, inside or outside the lane of traffic, etc." *Fox v. Lavender*, *supra*.

In the *Fox* case this court said that "when there is a paucity of facts from which any inference as to agency

or the lack of it can be had, (the) resolution may depend entirely upon presumptions." This court stated that Utah falls within that line of authorities which hold that no presumption of agency arises that the driver of the car is the agent of the owner where the owner is not present in the automobile. *Ferguson vs. Reynolds*, 52 *Utah* 583, 176 P. 267; *McFarlane vs. Winters*, 47 *Utah* 598, 155 P. 437.

This court in the *Fox* case discussed the object of the journey as it relates to the question of control. This court said at page 1052:

"Therefore, the ultimate object of what is to be done at the end of the journey is not controlling, but simply a circumstance to throw light upon the question of whether there was the right of control during the journey. The inquiry must still be directed as to whether an agency existed in the operation of the car, or the more fundamental question of whether there was the right of control on the part of another during the time the car was operated."

Applying the right to control test it is apparent that the Wayne Rasmussen Company did *not* have the legal right to control the *when*, the *where* and the *how* of the operation of the automobile. (Italics ours) This is a factual question which the Commission resolved in favor of the defendants. The record supports the decision of the Commission and preponderates against the contentions of the plaintiff.

The second test enunciated in the *Parkinson* case, *supra* is "whether the work done or to be done is a part of process in the trade or business of the employer. . . ."

In the *Parkinson* case *supra* the workman, Molyneaux, seeking compensation, was engaged in the independent calling of a trucker. Molyneaux made arrangements with one Parkinson, the receiver for Woolsulate, Inc. to haul sufficient coke to keep the company supplied at all times. Woolsulate, Inc. was engaged in the business of manufacturing insulation. Molyneaux was required to haul a minimum of 35 tons of coke per week but he could haul additional amounts as he desired, limited only by the company's coke storage capacity.

This court found that the work done by Molyneaux was not a part or process in the trade or business of Woolsulate, Inc. The court said at page 140:

"Woolsulate was in the business of manufacturing insulation. The record does not show that it was in the transportation or trucking business. It required coke for its business just as it required raw materials for its products. Some of the coke was delivered to it by railroad and some by truck. The company was primarily interested in obtaining the coke on time and having it deposited at convenient places. How or when the coke was hauled, whether by large truck or small, by day or night, by direct or circuitous route, etc., was immaterial to it so long as it always had readily available sufficient coke to operate its plant."

The act of transporting cars, whether new or used, to the Wayne Rasmussen Company in Ogden, Utah, was not a "part or process in the trade or business" of Wayne Rasmussen Company. Wayne Rasmussen Company was in the business of selling cars. There is no evidence that it was in the transportation business. It required cars for its business just as Woolsulate required coke and raw mate-

rials for its products. The Wayne Rasmussen Company was primarily interested in obtaining used cars when business in the new car market slowed up a little (R. 47). How or when the cars were transported, whether by day or night, by direct or circuitous route, was immaterial so long as the Wayne Rasmussen Company had used cars to sell when the sale of new cars declined.

The shipment of new cars to the Wayne Rasmussen Company would not be considered a part or process of Rasmussen's business of selling cars and likewise the transporting of used cars is not part of the trade or business of selling. The fact that Rasmussen's salesmen as well as others picked up the cars and drove them back to Ogden does not make the work done part of the business of Rasmussen. The salesmen were employed to sell cars and not transport cars to Ogden.

If transporting coke is not a part of the business of manufacturing insulation, then it reasonably follows that transporting cars is not a part of the business of selling cars.

The third test enunciated by this court in the Parkinson case is whether the work done or to be done is a definite job or piece of work. It is obvious that the work done by Dalton was a definite job.

In a number of Utah cases, this Court has found a workman to be an independent contractor because of the absence of control by the employer and because the *workman was to do a definite piece of work*. (Italics ours) In *Kinder v. Industrial Commission*, 106 Utah 448, 150 P.2d 109, this Court held a workman to be an independent contractor. The court found that the workman hauled

gravel in a truck owned by a third person and the Gravel Company paid the workman an agreed sum per yard for the gravel hauled, and gave him no directions as to the route to be travelled, the hours of work, the speed of the truck, or number of loads to be hauled per week or month, and exercised no control over his work except the right to direct where to load and unload the gravel. In *Luker Sand & Gravel Co., v. Industrial Commission*, 82 Utah 188, 23 P.2d 225, this Court found a workman to be an independent contractor where the workman contracted to dig a foundation for a building at a fixed price and to haul gravel for a fixed charge per load. In *Angel v. Industrial Commission*, 64 Utah 105, 228 P. 509, this Court held a workman to be an independent contractor where the workman contracted to pour cement at a certain price per cubic foot, and whose work was supervised by the contractor only to the extent of satisfying himself that it was done in a workmanlike manner as the work progressed. In *Gogoff v. Industrial Commission*, 77 Utah 355, 296 P. 229, this court held a workman to be an independent contractor where he contracted to drill tunnels in a quarry. Applying the tests recited by this court in the *Parkinson* case *supra* to the case at bar, it is evident that Dalton was an independent contractor and not an employee.

In *Christean v. Industrial Commission*, 113, Utah 451, 196 P.2d 502; the court was confronted with the question of whether Christean was an employee or an independent contractor. This court considered it desirable to test the facts of the case with the factors set forth in the Restatement of the Law of Agency, paragraph 220, page 483, which are as follows:

"(1) A servant is a person employed to perform service for another in his affairs and who, with respect to this physical conduct in the performance of the service, is subject to the other's control or right to control.

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"a. The extent of control which, by the agreement, the master may exercise over the details of the work;

"b. whether or not the employed is engaged in a distinct occupation or business;

"c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"d. the skill required in the particular occupation;

"e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"f. the length of time for which the person is employed;

"g. the method of payment, whether by the time or by the job;

"h. whether or not the work is a part of the regular business of the employer; and

"i. whether or not the parties believe they are creating the relationship of master and servant."

In applying the foregoing tests to the facts of the case at bar, it is apparent that:

"(a) the defendant had no control over the details of the applicant's work;

"(b) the applicant is in a distinct business, namely, the automobile repair business;

"(c) transporting automobiles does not require a specialist, but it is generally done without supervision;

"(d) transporting automobiles does not require any special skill;

"(e) the defendant supplied the automobile, but not the place of work;

"(f) the fact that the job was to be completed in 12 to 18 hours indicates that it was a very short duration;

"(g) the method of payment, *if any*, was for the job and not by the hour; (Italics ours)

"(h) the work is not part of the regular business of the defendant, as he is in the business of selling new and used cars and not transporting automobiles;

"(i) there is no indication as to what relationship the parties intended to create."

Applying Criteria (a), (b), (f), (g), and (h) to the case at bar shows the Wayne Rasmussen Company did not have the right of control over Dalton.

The various tests previously applied by this court have been used as aids in determining the primary question of whether the employer has the right to control the workmen. A careful reading of the record shows beyond any doubt that the defendant did not have the right to control the plaintiff in the work he did and was only interested in the result—the arrival of the cars in Ogden.

The appellant contends that the job done by Dalton and Porter was one "which was regularly and most usually

performed by regular employees for a wage." The record does not support this assertion. Purkey, bookkeeper for the two companies, stated that sometimes Metheny and Hansen brought in the used cars, sometimes they get others to do it, other times, Mr. Rasmussen brought them in, and then there were other "short-term employees" who were sent to bring the cars in. (R. 47, 48)

When Naylor told Dalton he had two cars in Rock Springs, Naylor said he had a deal with "somebody" to get them and they weren't going to, and it had caused an emergency. (R. 16)

There is no evidence in the record that Metheny and Hansen were going to Rock Springs and Dalton and Porter were asked to take their place. The record is silent as to the identity of the "somebody" who was to pick up the cars. There is no showing in the record whatsoever as to whether these other people were regular employees or not. Dalton and Porter did not step into the shoes of regular employees and do their job.

The plaintiff has cited two cases which are allegedly analogous on their facts; *Southern Pacific Company v. Industrial Commission*, 71 Utah 248, 264 P. 965, and *Utah Fire Clay Company v. Industrial Commission*, 86 Utah, 1, 40 P.2d 183. The facts in the Southern Pacific case are clearly distinguishable from the facts at bar. There the applicant was "* * * orally employed by the company's foreman of the section to cut the weeds at a daily wage of \$6.50, he to furnish, as he did, his own team and mower; that he received instructions from the foreman as to the particular place to work; that his work was extended as in the judgment of the foreman the weed cutting along the right of way was needed; that he was subject

to discharge at the will or direction of the foreman; that the foreman or roadmaster of the company directed Sur-rage where to start cutting, and when to change to other places of the work; that a separate pay roll was kept for him and when he was injured, the foreman employed another to finish the work."

These facts clearly show an employee-employer relationship and are not similar to the facts at bar.

In the *Utah Fire Clay Company* case *supra*, the facts again show an employer-employee relationship and are not similar to the case at bar. Here the evidence indicated that the applicant had been driving a truck engaged in work for Utah Fire Clay for six or seven years; that the Fire Clay Company "* * * controlled the actions of said drivers and directed them in the work they were to do, where they were to go, when they were to come to work, when they were through work, whether or not they could take vacations, what articles they were to haul and deliver, and when and where; that the said drivers returned after each trip to the Utah Fire Clay Company's plant for further orders and directions; the truck drivers had no right or option to refuse to do any of these things or to follow any directions given them by the Utah Fire Clay Company; that the Utah Fire Clay Company was the exclusive judge of when its work should be done by the truck drivers and the manner in which it should be done." Here the right to control the workman was obviously retained by the employer.

The plaintiff has also cited *Plewe Construction Company v. Industrial Commission*, 121 Utah 373, 242 P. 2d 561, as a recent Utah case dealing with the question of

whether a workman is an employee or an independent contractor.

In the *Plewe* case, *supra*, the Plewe Construction Company hired two roofers to shingle a roof. The two roofers employed a third man to expedite the work. The third man was injured when he fell from the roof. That the Plewe Construction Company retained the right to control and did control the workmen in the labors is demonstrated by the evidence. This court said:

“* * * the Plewe Construction Company furnished all the materials, decided where they were to be placed, told the workmen how to place the shingles and when to split them and to draw chalk lines before putting on the shingles so as to ensure straight lines.”

These cases involve factual situations where the employer clearly retained the right to control the workmen. In the case at bar, the Wayne Rasmussen Company did not retain the right to control Dalton in the service he performed.

POINT II

THE INDUSTRIAL COMMISSION GRANTED THE REHEARING FOR THE PURPOSE OF REDETERMINING EMPLOYER-EMPLOYEE RELATIONSHIP AND THE REASONABLENESS OF THE MEDICAL EXPENSES.

After the Industrial Commission rendered its initial decision on October 9, 1957, defendants petitioned the court for a rehearing to “redetermine the question of whether or not there was a contract of employment existing between the defendant Wayne Rasmussen Company,

and applicant, Sherman S. Dalton at the time the applicant suffered the injuries complained of." (R. 77) Defendants also requested the rehearing to determine if the medical expenses incurred by the applicant were reasonable. The petition for rehearing was filed November 12, 1957.

On December 4, 1957, counsel for plaintiff filed an argument in opposition to rehearing. In this argument counsel acknowledged that the rehearing had been requested for the purpose of having the commission redetermine the employment question as well as the reasonableness of the medical expenses. His argument was addressed to both questions. On December 5th, the Industrial Commission wrote an ex parte letter to counsel for plaintiff informing him that the transcript contained no evidence regarding medical and hospital expenses and in this case there had been a large bill submitted to defendants. The letter further stated "They (defendants) are entitled to have the Commission determine this issue."

The rehearing was held on February 10, 1958. At the rehearing the commission made the following statement:

"This case was heard on October 17, 1956, and award was made by the Commission October 9, 1957.

The petition for rehearing was filed November 12, 1957. Order granting the rehearing November 26, 1957.

This is a hearing *de novo*, gentlemen, and I assume that you're willing to stipulate that the transcript of the proceedings of the October 17, 1956, hearing may be received in evidence?

Mr. Aadnesen: So stipulated.

Mr. Black: So stipulate, your Honor.

The Commissioner: Now, the defendants asked for a rehearing for the purpose of determining the reasonableness of the medical expenses claimed by the applicant, and defendants also question the employer-employee relationship. I understand the defendants have filed a memorandum. Is that on this question of employment?

Mr. Aadnesen: That's the employment question.

The Commissioner: You want some time to answer that, Mr. Black?

Mr. Black: Yes, I would.

The Commissioner: How long?

Mr. Black: Well, twenty days.

The Commissioner: All right. The counsel for applicant will be given twenty days to file a reply memorandum to the memorandum of the defendant. (R. 84, 85).

You may proceed, Mr. Aadnesen."

At the rehearing, the commissioner stated that the proceeding was a hearing *de novo*. Counsel for plaintiff stipulated that the transcript of proceedings of October 17, 1956 could be introduced in evidence. Counsel for plaintiff did not object to the proceeding being a hearing *de novo* nor to the fact that the commissioner stated that the rehearing was for the purpose of determining the reasonableness of the medical expenses and the employee-employer relationship nor to the introduction of the transcript of proceedings of October 17, 1956. By failing to make any objections to the proceedings at the time the rehearing was held, counsel for plaintiff waived his objections.

The order granting the rehearing did not limit the issues. The order stated:

"IT IS ORDERED that the request for Rehearing filed herein by defendant's attorney on the 12th day of November, 1957, be, and the same is hereby granted." (R. 78)

In *Carter v. Industrial Commission*, 76 Utah 520, 290 P. 776, at 783 this court stated:

"The effect of granting the rehearing, unless otherwise restricted or limited, was to vacate and set aside the prior order or judgment of the commission and try the case anew."

That the Commission intended to reconsider the application in its entirety is apparent from the statement of the Commission that the proceeding was a hearing *de novo*.

Defendant complied with the law in filing its application for rehearing. The Utah statute regarding rehearing is as follows:

35-1-82. Rehearing before commission.— Any party including the commission of finance to a proceeding before the commission may, and before he can seek a review in the Supreme Court shall, within thirty days after written notice of its decision file an application before the commission for a rehearing of the matter.

In *Pinyon Queen Mining Co. v. Industrial Commission*, 59 Utah 402, 204 P. 323, counsel for the applicant moved that the record and proceedings returned by the Industrial Commission on rehearing be stricken for the reason that no notice of application for rehearing was ever served upon the applicant or his counsel and no op-

portunity was ever given the applicant to be heard respecting the motion for rehearing.

In response to the contention this court stated:
(P. 324)

"There is no formal hearing on a motion for rehearing, and when a petition for rehearing is pending it is properly disposed of ex parte. If denied, the adverse party has no cause for complaint, and, if granted, the parties are given notice of the rehearing, as was done in the instant case, by the Commission. The statute provides that the Industrial Commission shall not be bound by any technical or formal rules of procedure other than in the statute provided. Notice of the hearing on the petition for rehearing is not provided by the statute and no valid reason has been given why such notice should be required by the Commission. After the rehearing was granted, applicant was given notice of the second hearing, and thus all his rights were fully protected."

After the rehearing was granted in the case at bar, plaintiff was given notice of the date for the rehearing and thus all his rights were fully protected.

CONCLUSION

The record supports the order of the Commission that Dalton was either a volunteer or an independent contractor. The \$25.00 given to Dalton and Porter was for expenses and not for wages. Even if this court should find that Dalton was not a volunteer, then it must follow that he was an independent contractor.

This court has previously stated that the most important of the determinatives of the relationship between em-

ployer and workman is that of control. In determining whether the right to control exists all the facts and circumstances of the relationship must be examined. Control broken down into its elements includes the when, the where and the how. Dalton had the right to determine *when* he returned to Ogden, *where* he drove, and *how* he drove, whether fast or slow, behind or around traffic and whether on the inside or outside lane of traffic. (Italics ours). Under the right to control test and the other tests announced by this court, Dalton was not an employee of the Wayne Rasmussen Company at the time he was injured. The appellant has failed to show that the record preponderates against the conclusion of the Commission.

The petition for rehearing requested the Commission to redetermine the question of whether there was an employee-employer relationship existing between Dalton and the Wayne Rasmussen Company at the time Dalton was injured. The order granting the rehearing did not limit the issues. When the rehearing was held the Commissioner stated that the proceeding was a hearing *de novo* to determine if there was an employee-employer relationship and if the medical expenses were reasonable. Counsel for plaintiff did not object to the Commissioner's statement and having failed to oppose that action he has waived his objections.

The denial of compensation should be affirmed.

RAY, QUINNEY & NEBEKER,
GRANT C. AADNESEN,
STEPHEN B. NEBEKER

*Attorneys for Defendants
and Respondents*