

1959

# Sherman S. Dalton v. Industrial Commission of Utah et al : Petition for Rehearing

Utah Supreme Court

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

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IN THE SUPREME COURT

of the  
STATE OF UTAH

FILED

MAR 4 - 1959

Clerk, Supreme Court, Utah

SHERMAN S. DALTON,

Plaintiff and Appellant,

vs.

Case No.  
8943

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

Defendants and Respondents

PETITION FOR REHEARING

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

Attorneys for Defendants  
and Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHERMAN S. DALTON,

Plaintiff and Appellant,

vs.

Case No. 8943

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

Defendants and Respondents.

PETITION FOR REHEARING

The Wayne Rasmussen Company and  
Guarantee Insurance Company, defendants and  
respondents herein, respectfully petition this  
Honorable Court for a rehearing and reargument  
in the above entitled case. The petition is  
based upon the following grounds:

POINT I

THE COURT ERRED IN NOT HOLDING THAT DALTON WAS  
AN INDEPENDENT CONTRACTOR.

POINT II

THE COURT ERRED IN FAILING TO HOLD THAT OBER-  
HANSLY V. TRAVELERS INSURANCE COMPANY WAS

CONTROLLING.

POINT III

THE COURT ERRED IN HOLDING THAT THE ACTION OF THE COMMISSION WAS ARBITRARY AND CAPRICIOUS IN REVERSING ITSELF WITHOUT TAKING ANY ADDITIONAL EVIDENCE.

WHEREFORE, the defendants and respondents, petitioners herein, pray that the judgment and opinion of the court be re-examined and a reargument permitted of the entire case.

Respectfully submitted,

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

Attorneys for Petitioners

CERTIFICATE OF COUNSEL

I, Stephen B. Nebeker, one of the attorneys for the defendants and respondents, do hereby certify that I have carefully examined and considered the foregoing petition for rehearing, know the contents thereof, and that in

my opinion the same is well founded in point of law and is not made for the mere purpose of delaying the determination of said cause.

STEPHEN B. NEBEKER

## ARGUMENT

### POINT I

THE COURT ERRED IN NOT HOLDING THAT DALTON WAS AN INDEPENDENT CONTRACTOR.

The court, in its opinion in the instant case, states that because the commission was "\* \* \* laboring under a misapprehension as to the holding of this court in Oberhansly v. Travelers Insurance Company, 5 Utah 2d 15, 295 P.2d 1093, the award must be vacated." The Industrial Commission finally found that Dalton was not an employee of the defendant, Wayne Rasmussen Company, but that he was either a volunteer or an independent contractor (R. 96) (Italics ours). This court has completely ignored the Commission's conclusion that if Dalton was not a volunteer then he must of

necessity have been an independent contractor.

Even if the Commission was laboring under a misapprehension as to this court's holding in the Oberhansly case, supra, this court must still determine if the final order of the commission denying compensation is valid on the ground that Dalton was an independent contractor. This court has repeatedly announced that it is committed to the right to control test in determining whether a workman is an employee or an independent contractor. Respondent, in its initial brief, argued that under the right of control test, Dalton was clearly an independent contractor at the time he was injured. Respondent does not wish to burden this court by repeating the argument and citation of authorities contained in Point I of its brief. Suffice it to say that the right to control the driver of an automobile depends upon whether the employer has the right to control the when, where and how of the operation of the vehicle. It is obvious that the Wayne Rasmussen Company did not have



the right to control when Dalton returned to Ogden, where he drove the car and how he drove "whether slow or fast, behind or around traffic, inside or outside the lane of traffic, etc." See Fox v. Lavender, 89 Utah 115, 56 P.2d 1049.

The statutory definition of independent contractor contained in 35-1-42, U.C.A. 1953 states:

\*\* \* \* 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."

Dalton was clearly an independent contractor as that term has been defined by the Utah Legislature. He was not subject to the rule or control of the employer, was engaged only in the performance of a definite job and

was subordinate to his employer only in effecting a result.

In its opinion in the case at bar, this court states:

"\* \* \* (T)he evidence was clear that the \$25.00 less the price of the bus tickets was to be compensation for the job."  
(Italics ours)

This court has previously held that 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. Even if Dalton did receive some compensation for his work, this fact does not make him an employee. On the contrary, the lump sum advance payment to Dalton and Porter confirms Respondents contention that he was an independent contractor. An independent contractor is normally paid on a job basis rather than a hourly or weekly scale. The fact that Dalton and Porter received \$25.00 to bring two cars back to Ogden is consistent with the manner of

payment to an independent contractor. The final order of the Commission stated, in substance, that if the money Dalton received was expense money, then he would be a volunteer; but if the money received was compensation, then Dalton would be an independent contractor. In any event, he was not an employee, subject to the right of control of the Wayne Rasmussen Company.

The final order of the Commission denying compensation is correct because Dalton was an independent contractor at the time he was injured. This court erred in failing to find that if Dalton was not a volunteer, as that term is used in the Oberhansly case, supra, then he must have been an independent contractor.

## POINT II

THE COURT ERRED IN FAILING TO HOLD THAT OBERHANSLY V. TRAVELERS INSURANCE COMPANY WAS CONTROLLING.

In reviewing a case appealed to this

court from the Industrial Commission, this court has repeatedly held that the findings of the commission will not be disturbed in the absence of capricious or arbitrary action. In the opinion in the instant case, this court stated:

\*\* \* \* In fact there is no evidence from which it could reasonably be found that plaintiff volunteered to take the trip and drive back a car for no remuneration. Neither the plaintiff nor the company's representative so testified. There was no evidence of any relationship between the parties to make such a conclusion reasonable. On the contrary the evidence was clear that the \$25.00 less the price of the bus tickets was to be compensation for the job." (Italics ours)

There is evidence in the record from which the commission could have found that Dalton volunteered to take the trip and drive back a car for no remuneration.

Purkey, office manager and bookkeeper for the Porter Dalton Partnership and the Wayne Rasmussen Company, 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). Mr. Purkey was present during the conversation between Naylor and Dalton relative to picking up the cars and he recalled the incident as follows:

"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)

Dalton testified that Naylor asked him to go to Rock Springs to get the cars. His statement is in direct conflict with Purkey's testimony. Obviously there is evidence in the record from which the commission could have found that Dalton volunteered to take the trip

for no remuneration. In view of these conflicting statements, can it be said that the commission acted arbitrarily or capriciously in believing the testimony of Purkey who had no financial interest in the outcome of the proceedings rather than Dalton, whose testimony would obviously be influenced by his financial interest?

There is additional evidence in the record to support the commission's finding that Dalton volunteered to get the cars for no remuneration. Porter, Dalton's partner, testified that he told his wife he was going to Rock Springs to look for a new car when in fact "(W)e were going out on a binge." Porter testified as follows:

"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).

Purkey's statement that Dalton volunteered "Well, we will go get them" and Porter's statement that they were going out on a binge.



support the commission's finding that Dalton was a volunteer. In view of this substantial evidence, the commission was compelled to find that Dalton was a volunteer. It clearly was not unreasonable for the Commission to have found that Dalton was not an employee, in the ordinary meaning of the term, or under the Workmen's Compensation Act, for he was either a volunteer or an independent contractor. (Italics ours).

### POINT III

THE COURT ERRED IN HOLDING THAT THE ACTION OF THE COMMISSION WAS ARBITRARY AND CAPRICIOUS IN REVERSING ITSELF WITHOUT TAKING ANY ADDITIONAL EVIDENCE.

The Industrial Commission initially found that the applicant Sherman Dalton was an employee of the Wayne Rasmussen Company at the time of his injury and that he was entitled to compensation. Within thirty days after written notice of the decision, the Wayne Rasmussen Company and Guarantee Insurance Company filed a petition for rehearing. The petition for rehear-

ing asked the commission to redetermine the question of whether or not there was a contract of employment existing between the plaintiff and defendant, and if the medical expenses incurred by the applicant were reasonable. The petition for rehearing was granted. The order granting the rehearing 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."

This court has previously held that the effect of granting a rehearing is to vacate and set aside the prior order or judgment of the commission and requires that the case be tried anew. See Carter v. Industrial Commission, 76 U. 520, 290 P.776, Laws v. Industrial Commissioner 116 U. 432, 211 P.2d 194.

At the rehearing the commissioner stated that it was a hearing de novo and that he assumed that the parties were willing to stipulate that the transcript of the prior pro-



ceedings could be received in evidence. Both parties so stipulated. Evidence was then introduced concerning the medical expenses incurred by the applicant. After the rehearing the commission reversed its former order and found that the applicant was not an employee but was either a volunteer or an independent contractor. This action was taken by the commission before the initial order had become final. After the commission had entered its order denying compensation the applicant filed a petition for rehearing. This petition for rehearing was denied. The order denying compensation then became the final order of the commission. The applicant appealed to this court from that order.

In the concluding paragraph of its opinion this court stated:

"We appreciate that the Commission has the prerogative of making the determination of facts which will not be disturbed in the absence of capricious or arbitrary action. However, due to the fact that on the rehearing no new evidence was presented, a complete about face would be so

inconsistent as to compel us to reverse the second order."

Was the action taken by the commission in reversing itself without taking any additional evidence so arbitrary or capricious as to require a reversal of its decision?

This court is saying that if the commission grants a rehearing, which ipso facto vacates the prior order, it cannot review the facts and law and correct what it believes to be a previous erroneous order. Is the Industrial Commission, an administrative body, to be held to a more rigid code of procedure than a trial court? Under the Utah Rules of Civil Procedure a trial court is given the prerogative of changing its mind before a judgment becomes final as evidenced by Rule 50(b), where a judge may grant a judgment notwithstanding the verdict, and Rule 59(b)(7) where he may grant a new trial when there is error in law. It seems inconceivable that this court would say that the commission's actions were arbitrary or capricious because on rehearing it carefully reviewed the testimony

submitted at the first hearing and studied the memoranda filed by counsel and concluded that the first order was in error and should be vacated. (R. 96) Is the commission now to be precluded from reviewing the record of a first hearing when it has granted a rehearing for that express purpose? Must the commission let an incorrect order stand and force the parties to go to the expense of appealing to this court to have the order corrected? This doctrine violates the basic principles of administrative law. The Utah Legislature has stated that the commission is not to be bound by any technical or formal rules of procedure (35-1-88 U.C.A. 1953). The holding of this court now elevates the commission to a position of greater dignity than that enjoyed by a trial court, that is, that it can never reverse itself unless it hears new evidence. Once the order of the commission becomes final then the aggrieved party may petition this court for a writ of certiorari, and the final order of the commission is the order appealed. In

determining whether the commission has acted arbitrarily or capriciously, this court has announced the following rule:

"In the case of denial of compensation, the record must disclose that there is material, substantial, competent, uncontradicted evidence sufficient to make a disregard of it justify the conclusion, as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence."

Kent v. Industrial Commission, 89 U.

381, 57 P.2d 724. See also opinion of Mr.

Justice Wolfe in Norris v. Industrial Commission, 90 U. 256, 61 P.2d 413.

In the case at bar, this court stated that the commission acted arbitrarily because it reversed itself without taking any additional evidence. This holding fails to recognize that until an order becomes final the commission may try the case anew and make an order or judgment in lieu of the displaced former order or judgment. See Carter v. Industrial Commission, 76 U.

520, 290 P. 776, where this court said:

"When a case on merits is fully heard and tried by the commission and on due consideration an order is made or judgment rendered on merits, the commission ought not grant a rehearing or further hearing though timely and properly applied for, except on averments or a showing of sufficient grounds or good cause therefor. When such is not reasonably or satisfactorily made to appear, the application for a rehearing or further hearing should be denied. When, however, such is made to appear on a timely application made therefore, and when an unrestricted rehearing of the case on merits is granted, the commission must understand that the order theretofore made or judgment rendered is displaced and vacated and that it then becomes its legal duty to again hear and try the cause anew and make an order or render a judgment in lieu of the displaced former order or judgment. In such case, if it be so advised, it may adopt the prior findings made, if in its judgment they sufficiently reflect all of the material facts as disclosed by the evidence, and make a new order or render a new judgment accordingly, whether it be to the same or different effect than was the first or displaced order or judgment."  
(Italics ours)

The question before this court in cases

arising under the Workmen's Compensation Act is whether there is sufficient evidence in the record to support the findings of the Commission. This court should look at the final order of the commission and see if that order is supported by the facts. Until the order of the Commission is final, there is nothing that is reviewable and once it becomes final it should be the only order reviewed. In *Carter v. Industrial Commission*, supra, this court said that the granting of the rehearing takes from the employer whatever right he had to apply to the Supreme Court for a review for the reason that the granting of the rehearing leaves the cause with no final judgment or order subject to review. The Commission may have granted any number of rehearings for the purpose of correcting an error in law, taking new evidence or modifying a previous award, but the final award is the order which is appealed and is subject to being affirmed or vacated.

There is nothing in the Workmen's



Compensation Act which requires the Industrial Commission to take new evidence on a rehearing before it can reverse itself. It would seem that the intent of the Legislature in giving the Commission the right to rehear a matter would be to give it a chance to review the evidence and the law to be certain that the order of the commission was correct.

This Supreme Court also has the right to grant a rehearing where it has failed to consider some material point or has erred in its conclusions. The Industrial Commission may also err in one of its conclusions and should have the right to correct it without the submission of new evidence. Until the order of the commission becomes final it is subject to change on a petition for rehearing. The commission has the right and the duty to change an order if it is convinced the order is in error.

### CONCLUSION

This court has failed to consider whether the Commission's final order - that Dalton

was either a volunteer or an independent contractor is supported by the evidence. This court has failed to apply the right to control test which is axiomatic in Utah Workmen's Compensation cases. Applying the right to control test it is self-evident that the Wayne Rasmussen Company did not have the right to control Dalton in the manner and method in which he drove the car.

If, as in the case at bar, the record is conflicting and the commission has resolved the issues in favor of one party, then the commission's final order should not be vacated. As stated by this court in the opinion in the instant case, the commission has the duty to find the facts and those findings will not be disturbed unless the Commission has acted arbitrarily or capriciously. This court erred in holding that the Oberhansly case, supra, was not controlling because there is substantial evidence in the record which supports the commission's finding that Dalton volunteered to drive the cars back to Ogden.



It is obvious that neither the applicant nor the defendant acquire a vested interest in an order of the commission until it becomes final, and even then the order is subject to review by this court. As long as the commission does not violate the statutes or rudimentary requirements of fair play, its procedure should not be condemned. That this was the intent of the Legislature is apparent from 35-1-88 U.C.A. 1953. This court erred in holding that the Industrial Commission acted arbitrarily or capriciously in reversing itself without taking additional evidence.

For the foregoing reasons defendant respectfully requests this court to grant a rehearing to correct its conclusions.

Respectfully submitted,

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

Attorneys for Petitioners