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Harry Sutton and F. W. Black dba Eager Beaver Roofing Co. v. Industrial Comm. Of Utah and Curtis Owen Rupp : Brief of Petitioners

Utah Supreme Court

Andrew John Brennan; Attorney for Petitioners;

Case No. 9033

IN THE SUPREME COURT

of the

STATE OF UTAH

HARRY SUTTON and F. W. BLACK, doing business as EAGER BEAVER ROOFING COMPANY

vs.

THE INDUSTRIAL COMMISSION OF UTAH, and CURTIS OWEN RUPP.

BRIEF OF PETITIONERS

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Attorney for Petitioners

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BRIEF OF PETITIONERS

The issue before the Court is to determine if, at the time accidental injuries were sustained by Curtis Owen Rupp, while working on a roof, he was an employee of petitioners under the Utah Workmens' Compensation Act.

As indicated in the decision of the Industrial Commission the case rests upon an interpretation of Section 35-1-42 Utah Code Annotated 1953.

THE FACTS

Eager Beaver Roofing Company, a partnership of some three years standing, contracted with Glen Curtis, for the application of roofing at a set price per square (Tr. 14). Curtis contracted to apply the "Graber job" and employed the applicant as a helper (Tr. 16).

Rupp was not an employee of the partnership. As is universally and customarily the case, roofing application is sub-let to contractors who hire their own labor (Tr. 18) and profit thereby (Tr. 22). Neither of the parners attempted to control the execution of the work, neither engaged Rupp, neither had seen him nor had any contract with him at any time (Tr. 16). Eager Beaver had no employees whatsoever (Tr. 23).

Glen Curtis testified that he, applicant and one, Reynolds, were working the roof as a team and that he and Reynolds figured how much applicant was supposed to have earned prior to his accident (Tr. 28). Any payment received by Rupp would be out of the price per square contracted by the team or partnership of Curtis and Reynolds who were working on a 50-50 basis (Tr. 32).

The "foreman" on a job is actually a sub-contractor applicator engaged by the square who employs such help as he desires. The employed help "splits" the profit with the foreman (Tr. 41). The foreman and his partners

tell the kettleman how to do his work and they always work on a contract basis (Tr. 43).

EAGER BEAVER DID NOT EMPLOY RUPP

Neither of the partners knew applicant prior to the accident nor attempted to control his work. Applicant was employed by others who were in the language of Section 35-1-42:

> " * * * engaged in the performance of work as independent contractors. * * * The term independent contractors, 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 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 employers design."

Glen Curtis was engaged only to do a definite job and was free from control of the partnership in performance of the work. Nothing in the record or beyond it could be used to show that Glen Curtis was an employee, either at common law or in liberal and open interpretation of the section of the Act above quoted. Economic circumstances, financial statements, numbers in an organization (or lack thereof) are not the indicia used by the legislature to indicate what persons, companies or associations may operate as independent contractors under the terms of the Act. Our own late Justice

James H. Wolfe in his learned treatise "Determination of Employer-Employee Relationships in Social Legislation" recognized that the development of economic methods and business contractual relationships could not be set aside. At page 1023, Vol. XLI, Columbia Law Review, Justice Wolfe is reported:

> "If the judges could have projected themselves a hundred years into the future and from that vantage point have surveyed their own work, they might have seen fit to modify the policy of respondeat superior in certain instances without devising a relationship to create an exemption from the doctrine. But judge made law has the disadvantage that it only grows from case to case, from situation to situation
>
> The element which distinguished independent contractorship from the master-servant relationship was the absence of the right of control over the performance. The reason why in certain situations the 'employer' did not have such right of control was that in those situations the other party to the contract was engaged in an independent calling while he was accomplishing the result for which the other had employed him."

EAGER BEAVER NEITHER CONTROLLED THE WORK NOR HAD THE RIGHT TO CONTROL

One of the partners stated he had never been to the job site. The other indicated he had gone on one occasion to see how the work was progressing.

The case before the court is then quite distinguished from *Plewe Construction vs. Industrial Commission*, 121 U 375, 242 P. 2d 561 wherein the evidence disclosed that

the construction company supervised the work done by the shinglers and thus became the employer of a person employed by the shinglers. There the representative of the construction company told the shinglers how to place the shingles, marked lines for them to follow on the roof and directed the placing of tarpualins until the roof was completed. Our situation is much to the contrary.

THE TOTAL SITUATION CONTROLS

In various cases presented for determination of the employer-employee relationship as distinguished from the independent contractor status, the rule has been established that the final determination may not be made upon isolated factors, as the "situation controls." *Bartels vs. Birmingham* 332 U. S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947. This seems to be a rule requiring the use of a spray gun rather than a brush because it is only after the paint is applied that one sees the picture product.

However, the factors of this case may be each separately considered, or bunched together, and the conclusion will constantly stand that applicant Rupp was not an employee of Eager Beaver under the statute or at common law.

It is quite apparent that the applicators Curtis, Reynolds and Barney indicate they and other roofing applicators hold themselves ready to contract with roofing companies for the finishing of roofs. Certain skill and know-how is required and then definite job procedures followed.

Upon the securing of a contract, the applicator hires his help at random without consulting the roofing company. The work goes on by the square and the job completed. Advance payments were made by the roofing company and final payment after a satisfactory completion. No wages, salaries or bonuses are extended.

There is no continuity of the relationship, no office for work scheduling, no set hours of work, no system of pay days, no schedule of hours, no supervision, no control, no right of control, nothing to indicate supervision was attempted. The whole and entire situation must be considered since there are no factors upon which the decision of the Industrial Commission may hang.

Two interesting cases, much in point, dealing with the federal insurance contributions tax law, both written by the Honorable William J. Brennan, Jr., reach different conclusions relative to the employer-employee as distinguished from independent contractor status because of the close distinguishment of factors involved. Consider *Silver vs. United States,* 131 F. Supp. 209 and *Ben vs. United States* 139 F. Supp. 883.

CONCLUSION

In the roofing and siding business and related industries it is accepted practice and procedure for companies, almost without exception, to secure applicators on a contract basis. Roofers and siders hold themselves available for a number of companies and become known

by reputation as to the quality of their work. . They are in fact independent contractors. It is submitted the decision of the Industrial Commission of Utah should be reversed.

Respectfully,

ANDREW JOHN BRENNAN
Attorney for Petitioners.