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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 Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Petitioners,

— vs. —

THE INDUSTRIAL COMMISSION
OF UTAH, and
CURTIS OWEN RUPP,

Respondents.

Clerk, Supreme Court, Utah

Case

No. 9033

BRIEF OF RESPONDENTS

WALTER L. BUDGE*Attorney General***HOMER F. WILKINSON***Assistant Attorney General**Attorneys for Respondents*

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No. 9033

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The Eager Beaver Roofing Company contracted with one Graber for the application of a roof (Tr. 12). Eager Beaver's foreman, Dan Reynolds, hired Glenn Curtis and Curtis Owen Rupp to assist in the installation of the roof (Tr. 40). On August 27, 1958, which was the first day of work, the claimant, Curtis Owen Rupp, was burned by hot tar (Tr. 10). Eager Beaver had no insurance coverage so Rupp made claim for compensation

under the Workmen's Compensation Act. In a decision rendered December 9, 1958, the Industrial Commission found that Curtis Owen Rupp was an employee of the Eager Beaver Roofing Company and that the company was liable for all medical and hospital expenses and compensation until applicant is released.

STATEMENT OF THE CASE

The sole question to be determined by this appeal is whether the respondent, Curtis Owen Rupp, was an employee of the petitioner, Eager Beaver Roofing Company, or an independent contractor in relation to the petitioner. The law is well settled as to the definition and distinction between an employee and independent contractor. *Stricker v. Industrial Commission*, 55 U. 603, 188 P. 849; *Christean v. Industrial Commission*, 113 U. 451, 196 P. 2d 502. The Utah Legislature has defined the terms as are found in the Workmen's Compensation Act, Section 35-1-42, U.C.A. 1953:

"* * * Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all sub-contractors 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 en-

gaged 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."

The Utah Supreme Court, in the case of *Parkinson v. Industrial Commission*, 110 U. 309, 172 P. 2d 133, after quoting the above statute, stated:

"From these definitions 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.

In Workmen's Compensation cases the courts have generally used these tests, and mainly number 1, to determine whether a person is an employee.

STATEMENT OF POINTS.

POINT I.

EAGER BEAVER ROOFING COMPANY HAD THE RIGHT TO CONTROL THE WORK OF CURTIS OWEN RUPP.

POINT II.

WORK PERFORMED OR TO BE PERFORMED BY CURTIS OWEN RUPP IS A PART OR PROCESS IN THE TRADE OF EAGER BEAVER ROOFING COMPANY.

POINT III.

THE WORK PERFORMED OR TO BE PERFORMED BY CURTIS OWEN RUPP IS NOT A DEFINITE JOB OR PIECE OF WORK.

POINT IV.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE DECISION OF THE COMMISSION.

ARGUMENT

POINT I.

EAGER BEAVER ROOFING COMPANY HAD THE RIGHT TO CONTROL THE WORK OF CURTIS OWEN RUPP.

One of the factors which must be considered is what the intent of the Legislature was in enacting Section 35-1-42, U.C.A. 1953. In the case of *Utah Fire Clay Company v. Industrial Commission*, 40 P. 2d 183, the company contracted with one R. S. James to furnish all trucks and drivers to perform transportation and delivery service. Upon the injury of one of the drivers, the court, in recognizing the contract relationship, held that the Utah Fire Clay Company had the right to exercise control over the drivers of R. S. James. The court stated:

“The question for determination is, not whether R. S. James was a contractor, but whether, notwithstanding the contract relationship which is clearly shown and which might be characterized by some of the elements incident to the relationship of independent contractor, it is such a relationship as is covered and referred to in the first sentence

of the quoted section of the statute as distinguished from the status of independent contractor defined in the latter part of the section. Such a contract is entirely proper and not in any sense unlawful. There is not anything in the statute which would prevent the company from having its delivery work done under and pursuant to such contract arrangement. The Legislature, however, undertook by this section to provide that workmen engaged in certain kinds of contract employment should have the benefit of the Compensation Law, and has provided that such workmen are, for the purposes of the act, to be regarded as employees of the contractee."

Again the Utah Supreme Court in the case of *Angel v. Industrial Commission of Utah*, 228 P. 509, reasoned:

"* * * The intention of the first part of the statute evidently was to prevent a custom, which was becoming prevalent with employers, of parceling out, under guise of contracts, the work to be performed among many so-called contractors, while at the same time the employer retained supervision and control of the work. This custom was clearly an attempt to evade the provisions of the Industrial Act and constituted the mischief which the Legislature sought to remedy. In our opinion it made no change in the general law as it existed before the act was passed, but it was, nevertheless, a solemn declaration of the Legislature that whenever the employer retained supervision and control of the work to be performed, no matter what relation he had sought to establish, the workmen under him were to be deemed his employees."

In view of the legislative intent, the court should take a clear view of the facts of this case and the practice of the roofing industry in trying to evade their responsi-

bilities under the Workmen's Compensation Act by creating a subterfuge of the law by attempting to make their employees independent contractors under the guise of a contract as set forth in the facts of this case. The Commission, in deciding this case, recognized this practice, for it reads on page 50 of the transcript as follows:

"We have always looked with suspicion on a general practice in the roofing industry to contract labor. The usual result is a no-coverage case."

The Commission based its decision on the right to control, for in its decision on page 50 of the transcript, it states:

"We emphasize the fact that the failure to exercise the right to control is not controlling. It only makes the problem more difficult. In most of the cases there is very little, if any, actual visual control although the right exists.

"We believe that this case is similar to Pleu Construction Company v. Ind. Com. 121 U. 375, 242 P. 2d 561, although the evidence in this case is not as conclusive on the issue of control. Apparently, there was no actual control exercised by Eager Beaver Roofing Company. However, there is some evidence that Reynolds was a foreman and that he hired applicant."

The facts and issue of the Pleu Construction case, supra, are almost identical with the case at hand. The following is a comparison of the two cases:

(1) Companies in both cases contracted for the installation of a roof and the roofers were to be paid by the square (Tr. 15).

(2) Initial instructions were given by the companies in both cases as to how the roof should be put on (Tr. 21).

(3) The roofers hired an additional man to assist them; in the Pleu case a shingler, and in the instant case, Rupp, a kettleman (Tr. 31). The hiring in the principal case was done by Eager Beaver's foreman, which would certainly make Rupp an employee of the company. The testimony of Glenn Curtis, Curtis Owen Rupp and Wendell Barney was that Black, one of the partners of Eager Beaver, told them that Reynolds was their foreman (Tr. 27, 34, 39). Black tried to deny this by qualifying his answer and making a play on words as to what the definition of a foreman is, again trying to evade their responsibilities under the Workmen's Compensation Act (Tr. 46). Reynolds was also given advance payments by Eager Beaver Company, showing what a trusted employee he was (Tr. 24). This court should be extremely critical of the position taken by the petitioner.

Petitioner, on page 3 of his brief, denied that Eager Beaver employed Rupp. Even if this contention were true, it would not weaken the respondents' position, for in the Pleu case, the court held that the shingler was an employee even though the roofers hired him by placing an ad in the paper, and the company had nothing to do with the actual hiring.

(4) The additional man was to be paid out of the square price that the companies agreed to pay the roofers (Tr. 30). The instant case even goes further, for Eager Beaver paid Rupp direct for his time (Tr. 44).

(5) Material for the roof was furnished by the companies. The Eager Beaver Company even furnished the roofer the use of their trucks, which certainly is an element of employment (Tr. 16).

(6) In either case, there was no set time to report for or leave work.

(7) The petitioners in the Pleu case were at the job and exercised actual control during the process of the roofing, while in the principal case one of the partners was at the job (Tr. 21) but the claimant was injured during the morning of the first day's work before there was an opportunity for the partner to exercise actual control. All of the elements of control were present, but there was no necessity to exercise control other than the initial instructions which were given. If the job had proceeded as in the Pleu case, and the roof was put on wrong as in that case, Eager Beaver would have certainly stepped in and exercised their right. The Utah Supreme Court, in the case of *Parkinson v. Industrial Commission*, *supra*, stated:

“The most important of the determinatives of the relationship between workman and employer is that of control. The existence of a potential right to control is sufficient to create the relationship even though that right is in fact never exercised. *Luker Sand & Gravel Co. v. Industrial Commission*, *supra*; *Utah Fire Clay Co. v. Industrial Comm.*, 86 Utah 1, 40 P. 2d 183; Annotation 120 A. L. R. 1031. To determine whether the right to control exists, all facts and circumstances of the relationship must be examined. The contract be-

tween the parties ordinarily does not expressly mention the right of control. And even though it expressly abjures control by the employer, yet the employer-employee relationship may exist if in fact the right to control exists."

The right to control was present and the decision of the Industrial Commission should be upheld.

POINT II.

WORK PERFORMED OR TO BE PERFORMED BY CURTIS OWEN RUPP IS A PART OR PROCESS IN THE TRADE OF EAGER BEAVER ROOFING COMPANY.

The next factor to be considered is whether the work performed by Rupp was a part or process in the business of Eager Beaver Roofing Company. This factor is only important as to how it affects the control aspect, for in the Parkinson case, *supra*, the court said:

"* * * If the work to be done is a part or process of the employer's business, it is more probable that the employer would closely supervise that part or process and therefore more probable that he has the right to control how the workman does his job. * * *"

The Supreme Court of Utah in the Utah Fire Clay case, *supra*, in quoting from the Arizona case of *Grabe v. Industrial Commission*, 299 P. 1031, stated:

"A procures B to do certain work for him which is a part or process in A's trade or business, and retains supervision or control over the work, then B and all B's employees and subcontractors to the Nth degree are, for the purposes of the Compem-

sation Act, employees of A, no matter what the terms or method of employment or compensation. It is obvious that were this not so the beneficent purposes of the act could and would be easily defeated or evaded by unscrupulous employers through the aid of various dummy intermediaries. The statute therefore brushes aside all forms and subterfuges and provides that one just, simple, and definite test. If the work be part of the regular business of the alleged employer, does he retain supervision or control thereof? All other matters are of importance only as they throw light on this question."

There is no doubt that the installation of the roof was part of the process or trade of the Eager Beaver Roofing Company, for their business is roofing. They entered into a contract with Graber for the installation of a roof, and did not enter into a contract to contract for the installation of the roof; in the one case a contract and the other case a contract to contract.

POINT III.

THE WORK PERFORMED OR TO BE PERFORMED BY CURTIS OWEN RUPP IS NOT A DEFINITE JOB OR PIECE OF WORK.

The definite job test, like the part or process test, is only important as to what bearing it has on the right to control. This test does not mean only whether a person performs a definite job, for many employees do that, but whether it is a job that is not directly related to the employer's business, and one for which he would hire an independent contractor to perform. The Parkinson case, *supra*, states:

“The test of a ‘definite job or piece of work’ must be taken largely with the fact that such work is of the type that the workman did as part of his independent calling, i.e., his ‘own business.’ Certainly many employees do a definite job or piece of work. In fact any employee does that at a particular time. The definite job meant is something not usually done by the employer as part of his business but something he usually gets some outside party to do. * * *”

The petitioner, on page 3 of his brief, takes the position that “Glenn Curtis was engaged only to do a definite job and was free from the control of the partnership in performance of the work.” Although the respondent does not agree with this position, the fact still remains that Curtis Owen Rupp was hired by Eager Beaver’s foreman as a kettleman to perform a ministerial task, which would certainly not be a definite job.

POINT IV.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE DECISION OF THE COMMISSION.

The Utah cases are voluminous on the position taken by the Supreme Court of the state in the case of *Park Utah Consol. Mines Company v. Industrial Commission*, 84 U. 481, 36 P. 2d 972. It was there said:

“It seems daft and unjust, certainly malapropos, that this court should be required to repeatedly expostulate with legists about principles so well established, and to so frequently reaffirm that the findings and conclusions of the commission on questions of fact are conclusive, and final and are

not subject to review, * * * and that they cannot be disturbed unless it appears as a matter of law that they are contrary to law and contrary to the evidence. We cannot weigh conflicting evidence, nor direct which of the two or more reasonable inferences ought to be drawn from evidence not in conflict. * * * In the determining of facts the conclusions of the commission are like the verdict of a jury, and will not be interfered with by this court when supported by some substantial evidence."

As is set forth above, there is sufficient evidence to support the decision of the commission.

CONCLUSION

It is respectfully submitted that the Court should affirm the decision of the Commission. *

Respectfully submitted

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