

1961

John G. Hendrie Co. v. Industrial Commission of Utah et al : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *John G. Hendrie Co. v. Industrial Comm. Of Utah*, No. 9368 (Utah Supreme Court, 1961).
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IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN G. HENDRIE COMPANY,
INC., a corporation,
Plaintiff and Appellant,

VS.

INDUSTRIAL COMMISSION OF
THE STATE OF UTAH;
LAURETTA M. GLADDEN,
widow; and LOUISE GLAD-
DEN, for and on behalf of
DARLENE LOUISE GLAD-
DEN, minor child of CLAR-
ENCE ROLAND GLADDEN,
deceased.

Defendants and Respondents

FILED

APR 10 1961

Clark, Supreme Court, Utah

Case No. 9368

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Respondents add the following Statement of Facts:

The decedent, Clarence Roland Gladden, was killed February 16, 1959 (R. 1). At the time of his death the decedent was employed by the John G. Hendrie Company (R. 1). The employer, John G. Hendrie Company, at the time of the deceased's

death, was building a swimming pool for the City of Clearfield (R. 1). However, the employer had not complied with the provisions of the Workman's Compensation Law of the State of Utah with reference to obtaining insurance coverage to protect its employees (R. 6-7). Application was filed by Loretta M. Gladden, wife of the deceased, and Louise Gladden, for and on behalf of Darlene Louise Gladden, minor daughter of the deceased. Since the employer, John G. Hendrie Co., had not complied with the law of the State of Utah with reference to securing insurance coverage for his employees, application was made before the Industrial Commission of the State of Colorado, where the John G. Hendrie Co. had obtained insurance coverage. That pursuant to the order of the Industrial Commission of Colorado, Colorado disclaimed any jurisdiction on the basis that the contract of hire was entered into in the State of Utah; that the fatal injury occurred in the State of Utah, and that the decedent was a resident of the State of Wyoming at the time of his death (R. 4).

Hearing was held before the Industrial Commission on December 14, 1959. Appellant, John G. Hendrie Co., has limited its appeal to the question of whether or not the deceased died from an accident arising out of or in the course of his employment.

It was stipulated at the hearing by the attorney for the plaintiff and appellant (R. 18):

“We will stipulate that he (deceased) was employed at the time of his death. We will further stipulate that he died as a result of an accident as stated in the petition but it is denied that the accident arose out of or was in the course of his employment.”

In other words, that he was an employee on the job at the time of his death (R. 18).

Mr. S. W. Smith testified that on the 16th of February, 1959, he was employed by John G. Hendrie Co. (R. 19); that he was the superintendent of construction on the particular job in question, and that as a part of his job he had the supervision of the employee, the deceased man, Clarence R. Gladden (R. 20). Mr. Smith testified (R. 20):

“Q. He was working in this ditch?

“A. Not at the time, no. As a matter of fact he had no specific job to do at that time, because I planned on using him for various incidental jobs around there during the afternoon. And at this time, with no definite thing to do, why he was the type that always found something to do anyhow, and I’m sure — rather I’m not sure what he was doing at that time. I can’t be sure what he was doing. There was 35 or 45 minutes maybe that he had no specific job to do, but there specifically was no specific job to do in the ditch.”

At R. 21 Mr. Smith was asked whether or not

he remembered being in the home of a Mr. and Mrs. Fred Little on the 16th of February, 1959, and at that time whether he recalled a statement he made to Mrs. Gladden and to Mr. and Mrs. Fred Little to the effect "that you should not have sent him down into the trench." Mr. Smith denied such statement. Mr. Smith testified that he did not know how the deceased got into the trench in which he was killed (R. 21-22). Mr. Smith testified that he had definitely told the decedent not to go back into the trench, however, that he had been in the trench prior to the accident. That on the prior occasion when he was in the trench it was only three and a half feet deep; that at the time the trench caved in when Mr. Smith was asked how deep it was, he stated that it was four feet deep (R. 23). On cross-examination Mr. Smith testified (R. 24-25):

"Q. Mr. Smith, do you specifically tell each one of the workers what to do?

"A. Yes.

"Q. So if I were working for you, and you told me to do one job and it took me a half-hour, would I then sit down and wait for you to come and tell me what else to do?

"A. Not normally. Normally I'd find out that you had done your prescribed work, and I'd put you on something else."

At R. 32 of the record Mr. Smith further testified:

“Q. Was there any other person on that job at that time, in charge and authorized to give him orders?

“A. No.

“Q. Did you see him go back down into the ditch?

“A. No, I didn’t.”

Mr. Smith testified further there were approximately eleven or twelve people in the area and on the job somewhere near where Mr. Gladden was killed and apparently none of them saw how Mr. Gladden got into the trench — whether he fell, slid in, or got in of his own volition (R. 33).

Mrs. Laurretta Gladden testified that after the accident her son had taken her to the home of Mr. and Mrs. Little and that while she was there Mr. S. W. Smith, the foreman, came to the home. That there in the presence of Mr. and Mrs. Little, Mrs. Gladden’s son and his wife, and she thought probably there may have been some police officers present, Mr. Smith stated (R. 38-39):

“Q. Will you tell us what that conversation was?

A. Well, as far as I can remember he came in to tell me how sorry he was, and explain what had happened. And then he said it was the first time that his company had ever had an accident, and that — the way I remember it — he said he shouldn’t have sent Mr. Gladden down in the ditch, to clean out a

valve, or something was mentioned in it. I can't remember the exact words. And he said a settlement would be made within a month, or something like that.

"Q. But he definitely stated that he should not have sent Mr. Gladden down into the trench?

A. That's the way I understood it to be. And some valve or something was mentioned. But I don't know anything about anything like that."

On the 2nd of May, 1960, further hearing was held in the above matter. At that hearing Ellen Irene Pelton was called as a witness and at R. 89 and 90 of the record she testified as follows:

"Q. Calling your attention to the 16th day of February, 1959, did you have occasion to be in the home of your mother, Mrs. Little?

"A. I did.

"Q. Somewheres in the evening, or towards evening?

"A. I did.

"Q. And on that occasion did an individual by the name of Bill Smith come into your home?

"A. He did.

"Q. Will you tell us who was present at that time, as best you can remember?

A. There was my father, my mother, myself, my husband, my younger brothers and Mrs. Gladden.

“Q. I see. Do you remember, and would you tell us, what conversation you had with this Bill Smith? In other words what Bill Smith said and what you said.

A. Oh, he said that he was very sorry about the death, and that he shouldn't have sent Mr. Gladden down into the ditch to unplug the pipes, because the ditch had caved in three times prior to that.”

Further, at said hearing a Mrs. Marvis McQuillan Little testified (R. 92):

“Q. Calling your attention to the 16th of February, 1959 — the evening of the death of Mr. Clarence R. Gladden — do you recall being in your home that evening, and having a conversation with a Mr. Bill Smith?

A. Yes.

“Q. And would you tell us who was present at that time?

A. Mrs. Gladden, Loren Pelton, Ellen Pelton, Laurence Pelton, John Little, Ted Little, Fred Little and myself.

“Q. And will you tell us the conversation that was had at that time with Mr. Bill Smith?

A. He said he was very sorry. He shouldn't have sent Mr. Gladden into the trench. It had caved before, and he shouldn't have done it.”

On the 19th of July, 1960, decision was rendered by the Commission which in part reads as follows (R. 107-108):

“If we believe the testimony of witnesses

for applicants, we must find that deceased did not depart from his employment.

“We call attention to the fact that no one saw deceased enter the ditch, but he was found in the ditch covered almost completely by frozen earth. He either entered the ditch in violation of the order of Mr. Smith, fell into the ditch when the side caved or, if we believe applicant’s witnesses, he entered the ditch pursuant to Mr. Smith’s order.

“We can legally presume that a servant obeys the orders of his master. We can legally presume that any individual will take necessary precautions to protect his own life.

“Nothing in the record explains why Mr. Gladden should have entered the ditch in violation of the order of Mr. Smith. The presumption is that Mr. Gladden would not have entered the dangerous ditch unless ordered to do so by Mr. Smith.

“The Commission chooses to believe the testimony of the three witnesses for applicant. Therefore, we find that deceased did not disobey the order of the superintendent, Mr. Smith, and that he did not depart from his employment. Therefore, we further find that the accident arose out of the employment of deceased.”

STATEMENT OF POINTS

POINT I.

THERE IS SUBSTANTIAL, COMPETENT EVIDENCE UPON WHICH THE COMMISSION COULD FIND THAT THE DEATH OF THE EMPLOYEE RESULTED FROM AN ACCIDENT WHICH AROSE OUT OF THE EMPLOYMENT OF DECEASED.

ARGUMENT

POINT I.

THERE IS SUBSTANTIAL, COMPETENT EVIDENCE UPON WHICH THE COMMISSION COULD FIND THAT THE DEATH OF THE EMPLOYEE RESULTED FROM AN ACCIDENT WHICH AROSE OUT OF THE EMPLOYMENT OF DECEASED.

Findings of the Industrial Commission must be upheld if there is substantial evidence to sustain them.

See *Utah Idaho Sugar Co. v. Industrial Commission*, 71 Utah 190, 263 P. 746:

“Unless, therefore it can be said upon the whole record that the commission clearly acted arbitrarily or capriciously in making its finding and decision, this court is powerless to interfere * * *” See *Kanalinakis v. Ind. Com.*, 67 Utah 174, 246 P 698; also *Lorange v. Ind. Com.*, 107 Utah 261, 153 P 2d 272; *Gogos v. Ind. Com.*, 87 Utah 101, 48 P 2d 449; *Stoddard v. Ind. Com.*, 103 Utah 351, 135 P 2d 256; *Higley v. Industrial Commission et al*, 75 U. 361, 285 P 306.

“Workmen’s Compensation Act should be liberally construed to effectuate its purposes and where there is doubt it should be resolved in favor of coverage of an employee.” See *M & K Corp. v. Ind. Com.*, 112 Utah 488, 189 P 2d 132; *Jones v. Calif Pack. Corp.*, 121 Utah 612, 242 P 2d 640.

Appellant argues that there is no competent testimony upon which the Commission could base

its findings, and states that the testimony of applicant, Lauretta Gladden, Ellen Irene Pelton and Mrs. Marvis McQuillan Little in relating their conversation with appellant's construction superintendent, S. A. Smith, is solely hearsay and cannot be used as a basis for the Commission's findings.

It should be remembered that S. W. Smith was appellant's superintendent on the job and actually supervising the deceased employee and the appellant's job at the time of the accident in question.

Respondents contend that their testimony was competent and substantial.

See Wigmore on Evidence, 3rd Ed. Par. 1078:

“(1) He who sets another person to do an act in his stead as agent is chargeable in substantive law by such acts are done under that authority; so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself.

“The question therefore turns upon the scope of the authority. This question, frequently enough a difficult one, depends upon the doctrine of agency applied to the circumstances of the case, and not upon any rule of evidence.

“The most difficult field in the application of this principle is that of tortious liability. For example, if A is an agent to drive a locomotive and a collision ensues, why may not his admissions, after the collision, ac-

knowledging his carelessness, be received against the employer? Are his statements under such circumstances not made in performance of work he was set to do? If he had before the collision been asked by a brakeman whether the train would take a switch at a certain point, and had mentioned receiving certain instructions from the train dispatcher, this statement might be regarded as made in the course of his appointed work. Nevertheless, such problems naturally admit of much speculation and barren argument.

“In that class of cases, namely, cases involving tortious liability, and, in particular, liability for injury in a railway accident, the question is usually complicated by the applicability of the Hearsay exception for Spontaneous Declaration, which admits statements made under the influence of excitement, before declarant had “time to contrive or invent.” This serves commonly to admit the immediate statements of the insured persons and the bystanders and since the much abused phrase ‘res gestae’ has been commonly employed to suggest the limitations of that Hearsay exception, and has also been employed (though having nothing in common) to designate the scope of an agent’s authority it is natural that judges should sometimes have discussed the two principles, in their application to personal injuries as if there were but one principle. That there are two distinct and unrelated principles involved must be apparent; and the sooner the courts insist on keeping them apart, the better for the intelligent development of the law of Evidence. Practically, the results of the two principles in application are decidedly different; for upon the

principle of the Hearsay exception such statements may (if admissible) be received against either party; but on the principle of Agency, against the employer only; moreover when offered against the employer, the limitations of the two principles would be in some respects more favorable, in others less favorable, to the reception of the evidence."

See *United American Fire Insurance Co. v. American Bonding Co.*, 146 Wis. 573, 131 N.W. 994, 996 (1911):

"We receive no good reason why, where an agent does an act which it is his duty under his contract to perform, evidence of that act after his principal duty as agent has ceased, should not be admissible as well as if made during the time he was actually performing his duties, and we think it would be the better rule to hold such testimony competent."

See *Hollander v. Smith & Smith*, 10 N.J. Super 82, 76 A. 2d 697, 21 ALR 2d 902; also *Fish Lake Resort Co. v. Ind. Com.*, 73 Utah 479, 275 P 580.

See *Johnson v. Bimini Hot Springs*, 56 Cal. App. 2d 892, 133 P 2d 650 (Personal injuries from fall on shower room floor, declaration of resident assistant manager and assistant secretary of defendant corporation admitted.)

Peterson v. General Geophysical Co., 185 P 2d 56 (Death from explosion; statement of employee that company would take care of everything admitted.)

Thorton v. Budge, 74 Idaho 103, 257 P 2d 238
(Collision of Motor Vehicles; statement of agent driver made some 20 to 30 minutes after the accident relative to the cause of collision admitted.)

Litman v. Peper, 214 Minn. 127, 7 N.W. 2d 334
(Wrongful death resulting from collision of decedent's car with truck of defendant association, and operated by its employee co-defendant; admissions of defendant, operator of truck, held to warrant submission of case to jury.)

The facts and stipulations in the record clearly show deceased was in the course of his employment and was killed by an accident arising out of his employment. Appellant has failed to prove that there was any departure from his employment.

The facts and circumstances surrounding decedent's death are clear and uncontroverted.

See 100 CJS par. 513, Workmen's Compensation:

“* * * and where the cause of a fall or death which occurs in the course of employment is unexplained an inference or presumption arises that the fall or death would not have occurred except for some condition, risk, or hazard of the employment.”

See also *Riley v. Oxford Paper Co.*, 103 A 2d 111, 149 Me. 418.

See also *Spring Canyon C. Co. v. Ind. Com.*, 58 U. 608, 615, 616, 201 P 173:

“Lest we be misunderstood, we desire to add here that by anything we have said we do not claim that we can dictate to the Commission what probative force or effect they shall give to any inference that may be legitimately deduced from the facts and circumstances, direct or circumstantial, that are made to appear in any case. Nor can we interfere with the weight they shall give to the evidence or to the credibility of the witnesses, but what we mean is that when there is purely a question of law presented, and which is necessarily involved in the decision or the award, it becomes our duty to determine that question. Whether an inference may legitimately be deduced from a particular fact, or from a state of facts, or from circumstances, is purely a question of law; while the probative force or effect that shall be given to the inference, if, as a matter of law, it may legitimately be deduced from the given fact, or state of facts, or circumstances, is a question of fact. Whether the inference in question may be deduced as claimed is therefore a question of law which we must determine as such.

“If, therefore, all the facts and circumstances in this case are considered, may it legitimately be inferred therefrom that the deceased was injured by an accident arising out of his employment? And may it be further inferred that the act which caused his death was ‘directed against him because of his employment?’ It frequently happens that an employee is found dead at or near his place of work. Usually there are some facts and circumstances from which it may be inferred that the death resulted from injuries inflicted by violence. There may also be and

usually are, marks or bruises, or other indications, found upon the body of the deceased from which it may be inferred what caused them. If the deceased worked in a mine there may be evidence that a rock or other material fell upon him from the roof, or from some other part of the mine. Again, timbers, if there were such, may have given way and fallen upon him, or have otherwise injured him. If he was working in a factory at or near moving machinery or other objects there may be some fact or circumstances which indicates that he was injured by the moving machinery or the other objects referred to. The reader may readily supply many other instances where injury may have been inflicted which resulted in death, and where the cause of death must be inferred from the facts and circumstances as they are made to appear."

CONCLUSION

The decision of the Industrial Commission should be sustained.

Respectfully submitted,

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