

1961

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

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *John G. Hendrie Co. v. Industrial Comm. Of Utah*, No. 9368 (Utah Supreme Court, 1961).
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Case No. 9368

IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN G. HENDRIE COMPANY, INC.,
a corporation,

Plaintiff,

vs.

INDUSTRIAL COMMISSION OF THE STATE
OF UTAH, LAURETTA M. GLADDEN, widow,
and LOUISE GLADDEN, for and on behalf of
DARLENE LOUISE GLADDEN, minor child of
CLARENCE ROLAND GLADDEN, deceased.

Defendants.

Appellant's Brief

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Defendants.

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is a proceeding under the statutes to review an award of Workmen's Compensation made by the Industrial Commission to the dependants of Clarence R Gladden, deceased, who was killed in an accident on February 16, 1959.

It is admitted by all, and there is no dispute that at the time of the accident and death of the decedent he was an employee of the plaintiff company, which was engaged in the performance of a contract for the con-

struction of a swimming pool at Clearfield, Utah, and that the accident and death occurred on the job site and during the normal hours of employment. In the proceedings before the Industrial Commission, the defense of the plaintiff here was based upon the contention, to which plaintiff here adheres, that at the time of the accident the decedent Gladden had departed from his employment and that the accident did not arise out of or in the course of his employment as required by Section 35-1-45 U.C.A., 1953.

We shall endeavor to outline all of the evidence on this point for the assistance of the court.

In the course of this presentation we shall refer to the plaintiff John G. Gendrie Company as the Employer and to the decedent Clarence R. Gladden as the employee.

On the morning of the accident the employee worked a part of the morning. At that time, according to the undisputed testimony of the witness Kahre, Mr. S. W. (Bill) Smith, the superintendent of construction on the job (R-20) had told the employee there was nothing more for him to do—that he should go home, but the employee said “No, he was going to put in to noon anyway”, and that at about that time “the digger came along and Smith said, ‘Well, you can go ahead and wait until noon, and we will get these planks around the pool and the plumbing pipes.’” The employee continued on the job, apparently with this assignment of distributing some planks and plumbing pipes about the job site.

On this day Smith and one Verne Kahre and the employee Gladden were the only employees of the em-

ployer on the job, although there were other employees of subcontractors or equipment furnishers (R-75).

While Smith was superintendent of construction (R-20), there is *no evidence whatsoever in the record* that he had any duties or authority except in connection with the actual construction work.

The digger or backhoe, operated by one Rex M. Terkelson, dug a trench along one side of the pool proper, the bottom and walls of which had been previously installed. The ditch was for the purpose of laying pipes for the drainage and water circulation system. The digger completed the ditch along one side and started work on another portion. Sometime about mid-afternoon, and forty-five minutes to an hour prior to the fatal accident, a small portion of the ditch near the end where the digger was then working slid off. At that time the employee Gladden was further up the ditch in the shallow portion. Superintendent Smith at that time ordered the employee Gladden to get out of the trench and to stay out and not to be caught in there under any circumstances. The giving of these orders was heard by the witnesses, Rex M. Terkelson and Verne C. Kahre, who fully corroborated the fact of their giving. Indeed, the fact that the orders were given is not disputed. (R-22 lines 18 to 24; lines 14 to 19; 26 and 27, lines 20 to 25 and 7 to 8; 55 and 56, lines 16 to 25 and 1 to 25; 57, lines 1 to 8; 72; 79; and 87).

The employee Gladden acknowledged the order. (R-32 lines 11 to 13; and 72, 78 and 79). In fact, the

employee told Smith that the employee was "able to take care of himself." (R-72) Superintendent Smith never changed or modified the order thus given. (R-32) Smith was the only man on the job authorized to give orders of this kind. (R-32) No one saw the actual accident when the trench caved in. The witness Kahre was in the swimming pool and heard Smith call out, "Man in the trench" and immediately went out to the site of the accident, where the trench had been $31\frac{1}{2}$ to 4 feet deep. Kahre dug decedent out with the help of other workmen. After the accident, the decedent was found "in a squatting position . . . like he was squatting down smoking or just passing the time of day." (R-70-71) If he had been standing up, the cave-in would have hit him about the middle of his stomach. By all indications, he wasn't working. (72) This is clear, because at the time there was no work to be done in the trench at that particular point (R-27, line 16 to 25; 22, lines 8 to 11; and 72). The decedent was dead by the time he could be extricated.

About nine o'clock that evening Kahre and Smith received a call at their Motel from a Mrs. Little, who asked Smith and Kahre to come to their home at Clearfield to talk to Mrs. Gladden. They went. (R-74)

Up to this point there is no dispute in any of the evidence. However, the testimony as to the conversation which took place at the Little home and the statements there made by Smith is conflicting. According to the witnesses, Lauretta Gladden, Marvis Little and Irene Pelton, Mr. Smith said that he was sorry it happened, and he shouldn't have sent Mr. Gladden

down into the ditch. (R-38 and 39; 90; and 92). On the contrary, Smith categorically denies having made any such statements (R-21; 26 and 23), and his version is corroborated by the witness Kahre, who testified that Smith's statement was "I am sorry to meet you under these circumstances. I am sorry it happened," that "If he had did what I told him to do this morning it would never have happened." (R-75) Kahre further testified that Smith further stated to Mrs. Gladden and the others at the Little home that Smith had told the decedent that morning there was nothing for him to do and that he should go on home, but that Smith, at Gladden's insistance, permitted him to stay and directed him to "get the planks around the pool and the plumbing pipes." (R-75) Kahre doesn't recall Smith ever making a statement to the effect that it was his fault and that he shouldn't have sent Clarence down into the trench. (R-76)

It must be observed that the only evidence whatsoever to contradict the positive evidence that the employee Gladden had disobeyed orders and departed from his employment in entering the ditch is the disputed hearsay testimony above mentioned by the witnesses Gladden, Pelton and Little. There is no evidence to indicate that Smith, a superintendent of construction, was authorized to make admissions with respect to claims against the company or to negotiate with the claimant Mrs. Gladden concerning the facts of the accident or any asserted libility. It is obvious, from the record, that Smith was invited to the Little home to discuss this question of liability.

STATEMENT OF POINTS

Point 1. There is a presumption that the deceased employee was not ordered back into the trench by the employer's superintendent of construction.

Point 2. There is no presumption that deceased employee was ordered back into the trench, or that he would not have entered the same unless ordered to do so.

Point 3. The evidence relating to the claimed admissions by the employer's superintendent of construction is hearsay and legally incompetent, and cannot support the award of the Commission.

Point 4. There is no competent evidence to support the findings and award of the Commission.

ARGUMENT

Point 1. *There is a presumption that the deceased employee was not ordered back into the trench by the employer's superintendent of construction.*

The existence of the presumption that Smith's orders to stay out of the trench continued in full force and effect to the time of the accident has double support in the facts and the law.

First, it is established without controversy and by the testimony of three witnesses that before the accident the trench in question had already caved in twice, and that Superintendent Smith, within an hour or less, had ordered decedent to stay out of the trench and not to get caught therein on any account. Smith testified positively that this direct order was never withdrawn or countermanded. The reasonableness and logic

of this testimony is supported by the inferences from the uncontroverted fact that cribbing was planned and intended to be completed before any further work should be done in the trench.

Thus, in point of fact decedent Gladden was, within the hour, under orders to stay out of the trench. Under the law of Utah, and indeed under the law generally accepted in America, a state of facts once shown to exist is presumed to continue unchanged, at least for a reasonable time under all of the circumstances surrounding the situation, in the absence of positive, affirmative evidence proving a subsequent change in the existing facts or circumstances. Thus, in the case of

Jensen vs. Logan City (1936)

89 Utah 347, 57 Pacific 2nd 708,

the Supreme Court held that evidence that on a certain evening loose wires from a cut fence were bent back and around an adjoining post raised a controlling inference or presumption which prevailed even over some evidence that such wires were found out across the sidewalk some hours later.

This is an example of the application of the general rule that when things are once proved to have existed in a particular state they are presumed to have continued in that state until the contrary is established by evidence either direct or presumptive.

See I Jones on Evidence Fourth Edition

Page 101 Section 58.

The rule is applicable to a status of personal re-

lations, such as the influence of duress by threat.

Eureka Bank vs. Bay (Kansas)
135 Pacific 584.

The application of this rule here is re-enforced by every reasonable consideration of humanity, legality of action by employers, and human nature in general. In addition, there is the fact testified to by Kahre and Smith that there was no reason whatever to order decedent back into the trench at that particular time and point, as the work in the trench had been completed there.

The presumption that Smith did not countermand his previous instructions and order decedent back into the trench as contended gains further legal and factual support here from the well nigh universal and very strong presumption of innocence, in favor of legality, and of compliance with law and of rightful action and performance of duty.

Under Section 35-1-12 UCA 1953, it is provided that:

“No employer shall construct or occupy or maintain any place of employment that is not safe, or require or knowingly permit any employee to be in any employment or place of employment which is not safe . . . and no employer shall fail or neglect to do every other thing necessary to protect the life, health, safety, and welfare of his employees . . .”

Under *Sections 68 and 69 of the General Safety Orders of The Industrial Commission of Utah, revised edition 1959*, it was clearly unlawful to order or to permit decedent to work in the trench under its known con-

dition at and prior to the time of the accident. Shoring or cribbing was required before this could be done. Under the provisions of *Section 35-1-39 UCA*, 1953 the violation of the statute above-mentioned, and failure, neglect, or refusal to obey the lawful safety orders of the Commission is a criminal offense.

As above indicated, under these circumstances, there arises a very strong presumption of innocence, in favor of legality and compliance with the law, and of rightful action and performance of duty by the employer and his superintendent. This presumption, of course, negatives any order by Mr. Smith directing decedent into the dangerous trench, as such an order would be in violation of duty, and criminal. Thus, the presumption is that no such order was given.

This presumption in favor of innocence and in favor of legality and performance of duty applies in civil cases as well as in criminal cases:

31 CJS "Evidence," page 728 Section 130; page 769, Section 134; and page 840, Section 150.

20 Am. Jur. "Evidence", Sec. 221, p. 217; Sec. 226, p. 221.

In said Section 221 of American Jurisprudence it is said:

"One of the strongest disputable presumptions known to the law is the presumption "that a person is innocent of crime." *This presumption applies not only in criminal cases, but also in civil cases where the commission of the crime come collaterally in question.*" (Emphasis added.)

This presumption has found familiar application in Utah in the presumption against fraud:

Utah National Bank vs. Nelson,
38 Utah 160, 111 Pacific 907,

and the presumption that persons living together as
man and wife are legally married:

In re: Pilcher's Estate
114 Utah 72, 197 Pacific 2nd 143.

It is one of the most favored presumptions in the law.
See

I Jones on Evidence - Civil Cases, Fourth Edition,
Section 12 and Section 101.

In the latter section the learned author says that;
“Generally speaking, no legal presumption is so
highly favored as that of innocence; ordinarily
substantially all other presumptions yield to it
in case of conflict.”

Thus, a favored and overpowering presumption in
favor of innocence and lawful activity buttresses and
supports the positive testimony of Mr. Smith and Mr.
Kahre that the decedent was ordered to remain out of
the trench, and Mr. Smith's testimony that such order
was not countermanded by any later order.

The testimony is further supported by all reason-
able inferences from the clearly established facts and
circumstances surrounding the occurrence and by the
fact that under the *Jensen vs. Logan City* case, above
cited, the order admittedly given is presumed to con-
tinue in effect until a revocation is affirmatively shown.

*Point 2. There is no presumption that deceased
employee was ordered back into the trench, or that he*

would not have entered the same unless ordered to do so.

In its decision, the Industrial Commission said (R108):

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 is 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.

With these unsupported and inapplicable legal statements included by the Commission in its decision, the plaintiff employer takes very sharp issue. It is respectfully submitted that in following these statements the Commission inadvertently erred, and that this in turn led it into error in making the award.

The presumption, generally recognized in negligence tort cases, that a decedent is presumed to be in due care for his life until evidence is presented to the contrary, does not apply in a Workmen's Compensation case, where the question is whether or not an accident arose out of or in the course of employment, rather than whether or not the decedent was guilty of contributory negligence. The Commission dragged this presumption in by the heels from an entirely different branch of the law. It should not have done so. Presumably without the benefit of this presumption, improperly relied on, the Commission would have reached a contrary conclusion under the evidence.

In Utah there is no presumption that an employee killed within the limits of his employment in terms of space and time in fact died in an accident arising out of or in the course of his employment. On the contrary the burden is on the claimant, even in death cases, to prove by a fair preponderance of the evidence that the death resulted from an accident arising out of or in the course of his employment.

Bingham Mines Company vs. Allsop
59 Utah 306, 203 Pacific 644 Headnote Number 3.
Higley vs. Industrial Commission
75 Utah 361, 368, 285 Pacific 306;
D. H. Perry Estate vs. Industrial Commission
79 Utah 8, 7 Pacific 2nd 269.
Thompson vs. Industrial Commission
82 Utah 247, 23 Pacific 2nd 930.

The problem of presumption affecting the proof of death by accident arising out of or in the course of employment is discussed in 100 *CJS*, 462 *et seq.*, "*Workmen's Compensation*," Section 513 *b*. It appears that there are some states where presumptions have been created by statute to the effect that, in cases of death or inability to testify, a workman is presumed to be in the course of his employment if he is within the time and spatial boundaries of his employment at the time of his death, and perhaps in one or two states such a presumption is indulged by virtue of judicial decision. However, Utah has no such statute, and such judicial decisions can have no force or effect in Utah in the face of the Utah decisions above cited under this point, or in the face of authorities cited under Point 1. Moreover, other authorities hold that under similar cir-

circumstances no presumption arises that the employee was in the course of his employment.

100 CJS Page 466, Citing

Mello vs. Industrial Accident Commission of California 258 Pacific 104, and

Reed vs. Sensenbaugh (Missouri Appeals)

86 Southwestern 2nd 388, and

71 CJ Page 1061, Note 10.

Moreover, all such presumptions in favor of the employee shift *only* the burden of going forward: "Such presumptions are rebuttable and they disappear on the introduction of evidence to the contrary."

100 CJS 465,

Notes 33 and 34, and cases there cited.

The extremely able and respected Massachusetts Court had occasion to consider a case almost exactly like the one under consideration, although the claimants there had the aid of a statutory presumption and hence were in a stronger position than the claimants here. See

LeBlanc's Case,

125 Northeastern 2nd 129.

In that case the Massachusetts Court held that where an employee was found crushed between an elevator and its shaft, and the employee had been forbidden to operate the elevator and instructed to ride on another elevator, the orders forbidding him to operate the elevators having been given on two occasions several days prior to the accident, *a statutory presumption that his presence on the elevator was connected with his employment could not operate*, and his dependent was

not entitled to compensation. The court in effect held that the presumption, even though raised by statute, applies only in the basence of all contrary or conflicting evidence; it merely shifts the duty to go forward, but not the risk of non-persuasion.

Here the evidence is positive and uncontrovered that within an hour prior to the accident the decedent had received positive orders, which he understood and acknowledged, to the effect that he was to stay completely out of the trench. There is further evidence that there was no reason for him to be in the trench which was connected with his employment. The presumptions of the continuation of these lawful orders arises by virtue of the *Jensen vs. Logan City* case, *supra*, and receives further very strong support from the universal presumption of innocence of crime and of compliance with law, as hereinbefore argued. As against all of these things, *plus* Smith's positive testimony that the order to stay out remained effective and was never countermanded, we have only claimed oral admissions alleged to have been made by Smith, the construction superintendent, at a meeting solicited by friends and relatives of the decedent's widow, whose first and primary concern (even on the evening of decedent's death) was money. Further, these alleged admissions are disputed not only by Smith, but by the independent and disinterested witness Kahre.

In passing, it should be said ^{concerning} ~~that~~ any presumption of "due care" (although irrelevant) and any presumption (if there be one) that servants today obey their masters, the very presence of the decedent employee in

^
That

the trench, at the time and under the circumstances and in the face of clear and uncountermanded orders, clearly and effectively rubs out and removes such presumptions and each of them. *Res ipsa loquitur*. The only orders established by competent evidence were to stay out of the trench, and decedent's presence in the trench proves that he was not following such orders. It is submitted that under the authorities and under the facts, the Commission's findings and award are not supported by the presumptions with which the Commission sought to bolster a desired result.

In conclusion on this point, the specified burden of proof resting on the claimants is in effect a presumption that a decedent was not in the course of his employment when killed, and this presumption carries through to the end of the case and until overcome by a preponderance of the evidence. The general subject of presumption is discussed by the Utah court in several Utah cases. Among the most recent and thorough discussions are those to be found in:

Wyatt vs. Baughman,

121 Utah 123, 239 Pacific 2nd 193, and

Wood vs. Strevell-Patterson Hardware Company
(1957), 6 Utah 2nd 340, 313 Pacific 2nd 800.

Under the rules there announced and under those hereinbefore referred to, any presumption that decedent Gladden was in the trench pursuant to orders from his superior or was there in the course of his employment were rebutted and completely disappeared from the case immediately upon introduction of the testimony of Messrs. Smith, Terkelson, and Kahre to the effect that

decedent had been ordered to stay aocompletely out of the trench. An employer does not have to tie an employee with an apron string to prove a limiting order.

Point 3. The evidence relating to the claimed admissions by the employer's superintendent of construction is hearsay and legally incompetent, and cannot support the award of the Commission.

There is absolutely no evidence whatsoever in the record to prove that Smith was authorized by defendant corporation to adjust the claims for money asserted on the evening of the accident, to stipulate any facts, or to make any admissions of fact in behalf of the corporation. He was purely a construction superintendent. The alleged admissions do not in any way relate to the prosecution of his employers business of construction of swimming pools, but on the contrary relate to an entirely extraneous and separate matter: namely, a claim for money again the corporation involving legal questions respecting which only an attorney could lawfully represent a corporation, as such representation involved the practice of law. He was not a general managing agent, but merely a superintendent of construction with duties confined to the prosecution of the work of construction.

Furthermore, the alleged admissions were not made either at the place, or during the time or in the course of his employment, but on the contrary were made many miles from the scene, at the home of Mr. and Mrs. Little, and some six hours or more after the accident, and some four hours or more after the close of the working day, during a meeting solicited by relatives of the claimant

Lauretta Gladden. *He was there for them; not for his employer.*

The alleged statements or admissions show on their face that they were adverse to the principal, and hence presented notice to the claimant that there was no authority to make the same. From the time of presentation of the claim to the managing authorities and attorneys of employer corporation to this date the authorized authorities of the employer have denied the validity of and refused to be bound by the alleged admission.

It clearly follows that under the law of evidence, as established in Utah and elsewhere, these alleged admissions were and are hearsay and were not competent as evidence against the employer corporation in this proceeding.

S. W. Bridges & Company vs. Candland

88 Utah 373, 54 Pacific 2nd 842;

31 CJS "Evidence" Page 1115 Note 63;

I Jones on Evidence in Civil Cases, Fourth Edition, Section 255, pages 488 and following.

See also I Jones on Evidence in Civil Cases, Fourth Edition, Section 357, Page 659.

In the *Candland Case Supra*, the Supreme Court held that statements of an agent employed to sell wool belonging to defendant, made after the transaction, to the effect that the plaintiff had failed to carry out the contract and had caused loss to the defendant, *were not admissible as admissions of the principal, since not within the agent's authority.* The case is exactly in point. The rule is substantially universal.

Of course, under the statutes relating to proceed-

ings before the Industrial Commission (Section 35-1-88, UCA, 1953), the Commission is not bound by the regular rules of evidence as established by the Supreme Court of Utah, and it can receive incompetent hearsay evidence, so that no objection to the admission of the evidence presented would avail. However, the Supreme Court of Utah has specifically held that, while the Industrial Commission may admit incompetent hearsay evidence, it cannot use the same as a basis of a finding or award.

Ogden Iron Works vs. Industrial Commission
102 Utah 492, 132 Pacific 2nd 376.

This case is exactly in point. The testimony as to Smith's alleged admission made outside the scope of his employment is pure hearsay and completely incompetent, and cannot form the basis of any award.

There is therefore, no competent evidence to show, that the decedent, at the time of the accident, was within the course of, or that the accident arose out of his employment, but on the contrary all of the competent evidence positively and affirmatively shows without any doubt that at the time and place of the accident the decedent had departed from the course of his employment and the accident did not arise therefrom.

Point 4. There is no competent evidence to support the findings and award of the Commission.

Point 4 follows more or less as a corollary upon the points previously discussed herein.

In Utah the employer has a right to define and to limit the duties and place of employment of its employees. In this case, by orders of the employer's sup-

erintendent of construction, given in accordance with the requirements of law, and which under the evidence and the presumptions applicable were never countermanded, *the ditch was excluded from the area of employment and all duty which could be there performed was excluded from the employment of the deceased employee Gladden.* Nevertheless, for some unknown reason decedent did enter into the ditch, violating specific instructions as to employment area and duty. When he did so, he departed from the course of his employment, and the accident did not and could not arise from his employment. See the controlling Utah cases of

Utah Copper Company vs. Industrial Commission, 62 Utah 33, 217 Pacific 1105, 33 ALR 1327, and

Salt Lake City vs. The Industrial Commission 103 Utah 581, 137 Pacific 2nd 364.

See also *LeBlanc's Case*, from Massachusetts, *supra*, which is substantially on all fours with the case at Bar.

In view of the fact that all of the competent evidence agrees that the employee left his employment, we do not have to prove *why* he did so. Only he knows, and there are a million reasons why he might have done so, all of them in violation of orders, and all of them involving his departure from his employment.. However, we can well infer from the evidence in the case that as he stated he thought "he could take care of himself," and had stooped down into the trench to light or smoke a cigarette.

It is interesting to note in passing that there is no evidence that he had any tools with him when he entered the trench.

When the incompetent, unauthorized, and hearsay statements attributed to the superintendent Smith are disregarded, as they must be in considering whether there is any evidence on which to base an award, there there is not one scintilla of evidence, and not one thin presumption to show that the deceased employee's accident in this case arose out of or in the course of his employment. On the contrary, all of the evidence and all lawful presumptions join to show that the decedent had departed from his employment at the time of the accident, and was in a place where he had no duties whatsoever and where he was specifically forbidden to be. Under these circumstances, there is no competent evidence to support the findings and award of the Commission and the same must, as a matter of law, be reversed and vacated.

Such should be the order of this court.

Respectfully submitted,

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and

FUGATE, MAY, MITCHEM and
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