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IN THE SUPREME COURT OF THE STATE OF UTAH

MERLE HINDS COMPANY, INC.
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, UNITED STATES FIDELITY AND GUARANTY COMPANY, PHILIP M. RALEIGH COMPANY AND HAROLD BAWDEN,
Defendants.

Case No. 10891

BRIEF OF DEFENDANT — HAROLD BAWDEN

APPEAL FROM THE INDUSTRIAL COMMISSION OF UTAH

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IN THE SUPREME COURT
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Defendants.

Case No. 10891

BRIEF OF DEFENDANT—HAROLD BAWDEN

APPEAL FROM THE
INDUSTRIAL COMMISSION OF UTAH

STATEMENT OF KIND OF CASE

This is a claim before the Industrial Commission of the State of Utah for disability by reason of an accident arising out of or in the course of employment.

DISPOSITION IN THE INDUSTRIAL COMMISSION

The matter was heard by the Industrial Commission and referred to a Medical Panel. The Industrial Commission made its Findings of Fact, Conclusions of Law, and Award on February 16, 1967, which Award was favorable to Applicant, Harold Bawden.

RELIEF SOUGHT ON APPEAL

Plaintiff Merle Hinds, Inc., seeks reversal of the Industrial Commission's Award.

STATEMENT OF FACTS

Defendant, Harold Bawden, disagrees with plaintiff's statement of the facts, in that they are stated as the appellant contends them to be, not stated, as they must be on appeal, favorable to the award of the Industrial Commission.

Harold Bawden was employed by defendant, Merle Hinds Company, Inc., as a salesman in September of 1962. (R. 28). His job as a salesman was to solicit orders from bakers, candy makers, ice cream makers, clubs and grocery stores. (R. 28-29). He was not furnished a car, but used his own. (R. 29). He worked on a commission basis, and was paid $2,984.41, in 1963, and $3,688.98, in 1964. (R. 33). His average weekly earnings in 1965 were between $69.72 and $78.00. (R. 33). Blue Cross and Blue Shield insurance coverage was furnished and paid for by Merle Hinds Company, Inc., for all of their employees. (R. 67). Further, United Commercial Travelers' Insurance Company also provided coverage for all of the employees of Merle Hinds Company, Inc., although the employees paid the premium on these policies. (R. 71-72). The Company continued to pay the Blue Cross - Blue Shield premiums for its employees until July of 1965. (R. 73). Mr. Bawden was covered under both coverages. (R. 71, R. 74).

Although Mr. Bawden indicated he was not employed to do other things, (R. 29), on the day in question, April 30, 1965, he checked into the warehouse and was helping driver, Gary Scott, get his load onto the dock and into his truck. (R. 29).

Mr. Bawden needed some merchandise to fill an order, and went back into the warehouse to get the merchandise. (R. 30). While standing in front of the stacked cases of merchandise, Mr. Bawden, in checking off his list of merchandise, gradually assumed a squatting position. He was bent over very far, with his head protruding quite far to see what was on the label of the bottom case. While in the bottom position he felt pain in his knee. (R. 30). He was working in a space somewhat less than three feet wide and demonstrated the position to the hearing examiner. (R. 31).

He couldn't straighten his leg out, but with the assistance of a broomstick, as a cane, he had the merchandise loaded into his wagon, and made delivery of the merchandise. (R. 31). Several other employees of the Merle Hinds Company, Inc., were cognizant of the fact that Mr. Bawden received the injury. (R. 32-35). Mr. Snedden himself indicates that it occurred exactly as Mr. Bawden testified. (R. 74).

Following the delivery of the merchandise, Mr. Bawden went to the Memorial Medical Clinic in Salt Lake City, Utah, and was seen by Dr. Wallace V. Jenkins on April 30, 1965. (R. 34). His right knee was x-rayed at this time. (R. 8, top of page). Mr. Bawden was treated

by Dr. Jenkins and referred to Dr. Sam Taylor for surgery. (R. 34). He was seen by Dr. Taylor on May 4, 1965, and reported to the L.D.S. Hospital for surgery on May 9, 1965. (R. 35).

Prior to the hospitalization, Merle Hinds Company, Company, Inc., learned that its Workmen's Compensation Insurance with U.S.F.&G. inadvertently had not been renewed on May 1, 1964 and was not in force on April 30, 1965. (R. 24, R. 37-38, R. 41, R. 69). Mr. Snedden then requested Mr. Bawden to report the accident under the Blue Cross - Blue Shield coverage, (R. 74-75), which Mr. Bawden did. (R. 37-38).

Mr. Bawden was released from the L. D. S. Hospital on May 16, 1965. (R. 36). He was re-hospitalized from May 19, 1965, to July 21, 1965, for complications resulting from the surgery. (R. 164). He was not able to return to work until June 6, 1966. (R. 162, R. 168).

Mr. Bawden filed a claim with the Industrial Commission on October 21, 1965, against Merle Hinds Company, Inc. (R. 9). Liability was denied by Merle Hinds Company, Inc., on January 17, 1966, on the basis of no accident on the premises in the course of employment. (R. 13). Claim was also made by defendant for coverage by United States Fidelity and Guaranty for lack of coverage because of negligence on the part of the insurance agent, Phillip M. Raleigh Company. (R. 13). United States Fidelity and Guaranty Company and Phillip M. Raleigh Company were named defendants in the Notice of Hearing of the claim. (R. 16).

Hearing was had on May 11, 1966, at the conclusion of which, applicant was referred to a medical panel. (R. 100).

The medical panel filed its report on October 27, 1966, (R. 160), and the report was mailed to all parties and their attorneys on October 27, 1966. No objections were filed to the report of the panel and the commission deemed it admitted in evidence.

The hearing examiner filed his Findings of Fact, Conclusions of Law and award which were passed and approved by the Industrial Commission of Utah on February 16, 1967. (R. 167-168). Defendant Merle Hinds Company, Inc., filed a petition for review on March 1, 1967, alleging there was no accident and requesting further hearing, (R. 171-172), which petition was denied by the Commission on March 16, 1967. (R. 172-A). Defendant filed a second Petition for Review on March 29, 1967, (R. 173-179)), raising a new question of an independent contractor relationship. This was denied by the Commission on April 6, 1967. (R. 180). Merle Hinds Company, Inc., then filed its Petition for a Writ of Review in this Court on April 12, 1967, (R. 181-186).

ARGUMENT

POINT I.

THE INDUSTRIAL COMMISSION PROPERLY FOUND THAT APPLICANT SUFFERED AN INJURY BY ACCIDENT ARISING OUT OF OR IN THE COURSE OF HIS EMPLOYMENT.

Section 35-1-45, U.C.A. 1953, in essence provides:

"Every employee . . . who is injured, . . . by acci-

> dent arising out of or in the course of his employment, wheresoever such injury occurred, . . . shall be entitled to receive, . . . compensation for loss sustained on account of such injury."

A hearing was had, after notice, on May 1, 1966, concerning the occurrence of the accident. Collateral matters, including Workmen's Compensation coverage, or the lack thereof and the reasons why, occupied the majority of the time in the hearing.

Harold Bawden testified as to the onset of the injury on April 30, 1965. That an injury occurred on April 30, 1965, there can be no doubt. Mr. Snedden himself indicated that the injury occurred exactly as Mr. Bawden testified, (R. 74):

> "Mr. Hurley: Now did you learn that Mr. Bawden had suffered an injury on April 30, 1965, did you not?
>
> Mr. Snedden: Yes, sir.
>
> Mr. Hurley: And that injury occurred, to the best of your knowledge, in the manner Mr. Bawden has testified?
>
> Mr. Snedden: Exactly, sir. Yes, sir."

It would appear that the next logical question is whether or not the injury is the result of an accident arising out of or in the course of his employment, which the Commission so found.

The uncontradicted record shows that Mr. Bawden after having assisted truck driver Gary Scott get merchandise loaded for delivery went back into the ware-

house of the Hinds' Company to get some merchandise. Because of the manner in which the merchandise was stacked, the space between the rows of merchandise and the necessity to see the label on the bottom box, resting on the floor, Mr. Bawden assumed a gradual crouching position as he read down the labels. When he had assumed a crouched position to the limits of his physical capacity, it was necessary to protrude his head in a downward manner in a space less than three feet, to view the bottom label. (R. 30-31). At this point he felt pain in his knee and he was unable to straighten out his leg. (R. 31). He hobbled about on one leg for a while hoping it would straighten out. (R. 32). The leg did not and with the aid of a broomstick as a cane, he was able to move about. His merchandise was loaded on his wagon by others and he made two deliveries. (R. 32).

The occurrence of the injury on the premises was known by others, Mr. Smith, Truck driver Gary Scott, Salesman Victor Sismonde, and Mrs. Halford, all employees of Merle Hinds Company, Inc. (R. 32). Mr. Bawden thinks Mr. and Mrs. Snedden were there on Friday, April 30, 1965, and aware of the injury. Mr. Snedden instructed him to have the knee looked at. (R. 33).

Mrs. Halford expressed doubt that Mr. and Mrs. Snedden were there on Friday, but her memory is admittedly vague. (R. 82). She admits talking to Mr. Bawden on Friday, April 30, 1965, but thinks it was Monday, May 3, 1965, when he really discussed it. (R. 82). As to a request to file an accident report Mrs. Halford

indicates that she didn't think he requested it, but she thought she said she would. (R. 82). She does remember going down the hall for a file sheet that goes to the Industrial Commission. (R. 83).

There seems to be no doubt that an injury occurred as alleged on April 30, 1965. Mr. Bawden was seen at the Memorial Medical Clinic by Dr. Jenkins that day and their records show that his right knee was x-rayed and a report of the x-ray was made by E. Paul Isgreen, M. D. (R 8-Top of page).

No issue was raised or concern expressed by anyone until the lack of Workmen's Compensation coverage was discovered. Mr. Bawden had reported to Memorial Medical Clinic that his knee had "slipped out" at work. (R. 8-Top; R. 3; R. 151). It appears that the lack of coverage was probably discovered when Memorial Medical Clinic called Mrs. Halford and wanted to know who carried Hinds' Workmen's Compensation. (R. 80). Mrs. Halford told her the State Insurance Fund. (R. 80). When the lady from Memorial Medical Clinic called back either two or three days or the next day later she informed Mrs. Halford the State Fund had no record of insurance on Merle Hinds Company, Inc. (R. 80).

With this discovery there were many calls and discussions to find out why there was no coverage. (R. 86). But, in order to alleviate this difficulty, by the testimony of Mr. Snedden (R. 74-75), the relucant testimony of Mrs. Halford (R. 86-87), and the testimony of Mr. Bawden (R. 37-38), Mr. Bawden was instructed by Mr.

Snedden to change the claim to one under Blue Cross - Blue Shield, which he did. Mr. Snedden also made inquiry of Mrs. Bawden relative to the change of claim to Blue Cross - Blue Shield. (R. 47). It is submitted that the reason for any conflicting statements made by Mr. Bawden were at the instigation, direction and control of Mr. Snedden.

During, and at the close of the hearing, as is set forth in plaintiff's brief, (P. 4), there were two main issues:

First: Whether or not there was an accident, and collaterally the question of medical causation or lack of medical causation. (R. 45).

Second: The issue of insurance coverage. (R. 100).

Plaintiff also wondered whether or not there was to be a preliminary hearing on the question of an accident. It is submitted that this was the purpose of the hearing just completed.

Pursuant to the provisions of 35-1-77, U.C.A. 1953, the medical aspects were referred to a medical panel, (R. 100), appointed by the Commission. (R. 156). The panel, with the addition of an internist (R. 157, 158), performed its statutory function and made its report in writing to the Commission October 27, 1966. (R. 160-164). Copies of the panel report were mailed by the Commission to all parties and their attorneys on October 27, 1966, by Certified Mail, return receipt requested, together with a cover letter notifying all parties they

had fifteen days within which to file written objections to the report. (R. 165-166).

No objections were filed by any party or attorney. Pursuant to the provisions of 35-1-77, U.C.A. 1953:

> "If no objections are so filed within such period, the report shall be deemed admitted in evidence and the Commission may base its finding and decision on the report of the panel, but shall not be bound by such report if there is other substantial conflicting evidence in the case which supports a contrary finding by the Commission."

The Comission followed the mandate of the statute and set forth in its findings: "The Medical Panel Report is therefore deemed in evidence." (R. 167).

In its Findings of Fact, the Commission sets forth two issues:

> "FINDINGS OF FACT:
>
> Two primary and one secondary issue appeared to be involved in the hearing, namely: (1) Whether or not the Defendant, Merle Hinds Company, had a policy of workmen's compensation insurance in effect at the time of the accident, April 30, 1965, and (2) Whether or not an accident occurred in the course of the Applicant's employment on this date, and secondarily, what was the medical result if such an accident occurred." (R. 167).

The Commission then found that there was no Workmen's Compensation insurance in effect on the date of the alleged accident, April 30, 1965. The Commission then found:

> "With respect to issue number 2, the Hearing Examiner finds that the Applicant, on the date in question, was engaged in activities unusual to him; i.e., assisting in getting out an order. In so doing, it required that he crouch low on his haunches in order to examine a low stocked row of merchandise. Such an unusual position created an unusual strain on the knee, which in turn created a split knee cartilage.
>
> It is evident that all employees of the Defendant, Merle Hinds Company, were well aware of its occurrence and the severe nature of the injury. The Applicant did not return to work after the 30th of April.
>
> Surgery was performed to repair the split knee cartilage, i.e., meniscectomy. A day and half following his discharge from the hospital, the Applicant became ill, was returned to the hospital, and after a lengthy and stormy hospital stay was finally released." (R. 167).

Plaintiff chooses to ignore the foregoing language, "Applicant . . . was engaged in *activities unusual to him;* i.e., assisting in getting out an order. . . . Such an *unusual position created an unusual strain* on the knee, which in turn created a *split knee cartilage.*" (emphasis ours)

This is the "injury" for which compensation is provided by 35-1-45, U.C.A. 1953.

Plaintiff's argument that it must result from an identifiable accident or accidents in the course of employments raises the correct issue, but fails to define what is meant by the term, "accident."

Pintar v. Industrial Commission, 14 Utah 2d 276, 382 P.2d 414 (1963) talks of an accident or accidents, but does not define the term.

Carling v. Industrial Commission, 16 Utah 2d 260, 399 P.2d 202 (1965) will place the term in its proper perspective wherein at page 202, and 204, it is stated:

> "The Workmen's Compensation Act, Section 35-1-45, U.C.A. 1953, provides for an award to an employee" * * * who is injured * * * by *accident* arising out of or in the course of his employment * * *." There is no further definition of the term "accident," but this court has held that for the purpose of the Act it should be given a broad meaning. It connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events."

The principle enumerated in *Carling* is not new or novel to this jurisdiction as is illustrated by the cases cited in *Carling* and in particular *Graybar Electric Co. v. Industrial Commission,* 73 Utah 568, 276 P. 161 (1929).

Certainly the finding of the Commission above quoted is on all fours with the definition of an "accident" without the use of the term. It was the unusual work, the unusual position creating an unusual strain on the knee which produced the split knee cartilage, this certainly was an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. This is the Commission's finding, not the medical panels'.

In the next portion the Commission adopts the medical panel's findings as to the medical causation. Here the magic word accident appears and Plaintiff would have this Court believe that the Commission has abrogated its statutory function. This contention is thoroughly answered by this Court in the recent case of *Daniel R. Mellen v. Industrial Commission of Utah, et al,* decided August 24, 1967, and presently unreported. We quote the case as follows:

> "The plaintiff's main theme is that the Commission adopted the panel report which, it is urged, was a misstatement of the law. Counsel says: 'The denial of plaintiff's claim by the Medical Panel is based on incorrect interpretations of law by the Panel and is contrary to the undisputed evidence.'
>
> In the first place, the panel did not nor could not deny the claim, — the function of the Commission.
>
> The other answer to this contention is that in giving the panel the duty of analyzing this case, the Commission in a letter appointing the panel carefully said: "The Panel has no jurisdiction to make a finding on the occurrence of an accident. Therefore, in the Panel Report just preceding the findings and conclusions, the following language should be used: 'Assuming but not deciding that applicant had an accident as alleged the Panel finds, etc.' It is thus obvious that the Commission, in adopting the report, did not adopt any conclusions of law of the Panel if there were any, but only the medical facts and conclusions drawn."

The Bawden panel was operating under the same set of instructions. (R. 156). We submit that the Commission properly made its findings of fact and conclusions of law and they are amply supported by substantial, competent, uncontradicted evidence.

POINT II.

HAROLD BAWDEN WAS AN EMPLOYEE OF MERLE HINDS COMPANY, INC., NOT AN INDEPENDENT CONTRACTOR.

This issue has been interjected into this case on appeal and was never before the Industrial Commission. On March 1, 1967 plaintiff timely filed a Petition for Review of the Industrial Commission's award in this case. (R. 171-172). No claim was made at this time that Harold Bawden was an independent contractor. The petition for review was denied by a Commission Order dated March 16, 1967. (R. 172-A).

On March 29, 1967, plaintiff filed, out of time (See 35-1-82.55 U.C.A. 1953), a second Petition for Review. (R. 173-179). This was denied by Commission Order dated April 6, 1967. (R. 180). This was the first assertion on the part of the plaintiff that Harold Bawden had been considered anything but an employee of Merle Hinds Company, Inc. Plaintiff then timely filed its Petition for a Writ of Review in this court on Aprl 12, 1967. (R. 181-185).

Pursuant to the rules and regulations of the Industrial Commission, adopted and approved April 15, 1966, by Motion 23850, and in effect at the time of the hearing

of this matter and based upon recognized principles of practice, the plaintiff should be precluded from asserting this affirmative defense on appeal.

Although the Industrial Commission rules took effect after the filing of Harold Bawden's application and Merle Hinds Company, Inc., denial thereof, the applicant is entitled to some notice of affirmative defenses. Rule 6(c) of the Industrial Commission in effect on the date of the hearing provides:

> "(c) The answer must include all affirmative defenses intended to be used by the insurance carrier. If such affirmative defense is not included in the answer filed, the insurance carrier will be precluded from using it at the time of the hearing unless good cause can be shown as to why it was not so included. Affirmative defenses must be written with sufficient accuracy and detail that the applicant may be fully informed of the nature of the defense."

To permit the raising of this issue on appeal is unconscionable.

However, it is not conceded that the evidence shows the existence of an independent contractor relationship. On the contrary, taking the evidence in the light most favorable to upholding the award, it is apparent that at the hearing Merle Hinds Company, Inc., admitted the existence of the employee-employer relationship.

It would appear that five out of seven witnesses were called for the purpose of establishing the existence or non-existence of a Workmen's Compensation policy. (R.

20). That Merle Hinds Company, Inc., intended to cover Harold Bawden as an employee can't be argued. The injury was going to be reported by Mrs. Halford (R. 83), to the Industrial Commission as an "industrial accident." The State Insurance Fund was given as the carrier. (R. 30). No alarm or concern was raised until it became apparent that there was some doubt as to coverage. (R. 86). Then the shift to Blue Cross - Blue Shield. (R. 38).

On direct examination James K. Snedden states that he is the owner and president of Merle Hinds Company, Inc., operating as a corporation. (R. 67). He was asked by Mr. Mock: (R. 83).

> "Q. Mr. Snedden, did your company carry any Blue Cross - Blue Shield for employees?
>
> A. Yes, we did. Shortly after procuring the company they had Blue Cross in effect, and I agreed with my wife — who is a director — to carry Blue Cross and Blue Shield for our employees, and pay the full amount.
>
> Q. Was the full payment made by Merle Hinds Company?
>
> A. Yes."

Further questions by Mr. Mock to Mr. Snedden: (R. 71).

> "Q. What other policies do you carry for your employees, besides the Blue Cross - Blue Shield? That is at the time of this incident?
>
> A. That is all, sir. Well, I thought I was covered with all accidents of all types, and indus-

trial accidents. Because I had been in the past, I assumed I was at he present. I was so given the understanding.

Q. Are you acquainted with a company called the Utah Travelers — Let's see. What is it. U.T.C.?

A. United Commercial Travelers Insurance Company. Yes, I am. I'm a member, sir.

Q. Does this carry any coverage for any of your employees?

A. Yes, it does. All our employees are covered under that policy.

Q. Do you recall whether any claims were filed, on behalf of Mr. Bawden, under that policy?

A. I do. I helped him prepare a claim."

It does seem somewhat inconsistent to develop a long line of evidence covering Workmen's Compensation coverage for all employees, Blue Cross - Blue Shield for all employees, including paying the premium, United Commercial Travelers Insurance Company for all employees, include Harold Bawden in all insurance that is in force, then on appeal contend he is an independent contractor. It must be conceded that Merle Hinds, Inc., admitted the employee-employer relationship at hearing and should now be estopped to deny it.

Some light may be shed upon the intent of Merle Hinds Company, Inc., by reference to the Workmen's Compensation Policy issued by United States Fidelity and Guaranty and inadvertently cancelled. (R. 103). The policy provides coverage for:

> "Store Risks-Wholesale, or combined wholesale retail N.O.C.
>
> Salesmen, collector or messengers — Outside." (R. 103).

Which again illustrates the intent of Merle Hinds Company, Inc., to provide Workmen's Compensation Insurance coverage for all of its employees. Its president-owner, at the time of the injury and during the hearing as well as company's counsel during the hearing categorized Harold Bawden in the class of an employee and not as an independent contractor.

Taking the evidence as it now stands, it is defendant's position that the Plaintiff in asserting an affirmative defense has the burden of proof on the issue and the evidence will not sustain a finding that Mr. Bawden was an independent contractor.

In support of the Plaintiff's contention, the court's attention is directed to *Stover Bedding Co. v. Industrial Commission,* 99 Utah 423, 107 P.2d 1027, where this question was timely raised, evidence was thoroughly adduced at commission hearing and this court held that the applicant was an independent contractor.

Plaintiff points to some similarities between Mr. Bawden's employment and that of Mr. Knudson, the deceased applicant in *Stover.*

1. Both were commission salesmen.
2. Both solicited orders on there own initiative and discretion.

3. Both used their own automobile for which they were not compensated. (Plaintiff's Brief — p. 3).

Defendants submit that the record will only support that Mr. Bawden became an employee of Merle Hinds Company, Inc., in September, 1965. (R. 28). That he was hired as a salesman, to solicit orders from the trade for Merle Hinds which is a distributor of food products generally. (R. 28).

As a salesman he solicited orders from bakers, candy makers, ice cream makers, clubs and grocery stores. (R. 28-29). He was not furnished a car and used his own. (R. 29). He made deliveries, (R. 33) and was employed as an outside salesman on a commission basis. (R. 38).

The record is silent as to:

1. Use of own initiative and at his own discretion.
2. Whether he was compensated for the use of his automobile.

In citing the excerpt from *Stover Bedding* case as precedent for this case plaintiff glosses over the fact that there is no evidence as to: (Plaintiff's Brief - P. 5).

1. Written Contract,
2. Limits of Territory,
3. Instructions as to conduct of work,
4. Payment of expenses,

5. Trips to be made and when he should make them,

6. Control or right to control.

Hence, it would appear that any person employed as an outside salesman who uses his own car is an independent contractor.

Also glossed over by reference to the *Stover Bedding* case is the fact that:

1. Knudson, the deceased, was a salesman for Stover Bedding Co., and Smith and Davis Company simultaneously.

2. The accident occurred on a sales trip in Idaho and not on the employer's premises.

3. The only work deceased did at the factory was in relation to sales promotion and here the injury occurred in the course of filling a merchandise order which Bawden delivered.

Without belaboring the point further, it is submitted there isn't sufficient evidence to support the affirmative defense of independent contractor. Particularly in view of the state of the record where it is so obvious that during the hearing Plaintiff, by its president-owner by answer and counsel, by the form of question, were treating Harold Bawden as an employee and hoping to escape liability by showing that the injury did not occur as the result of a "definable accident."

This court in *Christean, et al, v. Industrial Commission, et al,* 113 Utah 451 196 P.2d 502, (1948) approved the various tests for determining the relaionship of servant and independent contractor as are set forth in the Restatement of Agency, Par. 220, page 483. The court again approves the various tests set forth in the Restatement of Agency in *Larry Nicholson v. Industrial Commission, et al,* 14 Utah 2d 3, 376 P.2d 386, (1962). Both of these cases were presented to the Industrial Commission and this court on the issue of independent contractor relationship. Both of these cases involved written contracts of employment and although the results reached in each case were different, the commission and the court were afforded the opportunity of applying the law to the facts.

In the case of *Sutton v. Industrial Commission of Utah,* 9 Utah 2d 399, 344 P.2d 538, (1959) this court reviewed a case in which the defense of independent contractor was raised, not based upon a written agreement. Again the issue was asserted in the commission hearing and the court summarized the problem at pages 539, 540, as follows:

> "The distinction beween the relationship of employer - employee in which the employee has various advantages, including workmen's compensation, as contrasted with the independent contractor status, in which he does not have those advantages, has been a constant subject of controversy and has been dealt with in numerous cases by this court. The conditions of employment are so various that it has proved difficult to

> formulate a definition setting forth specific factors which will invariably apply as an exclusive definition of the employer-employee relationship as distinguished from the status of independent contractor. *Generally speaking, an employee is one who is hired and paid at a given rate to do work that is part of the trade or business of the employer, and is subject to constant supervision and control in performing his duties; whereas the independent contractor is engaged to do a particular job or piece of work for a set sum and is not subject for its completion.*" (Emphasis ours)

We submit that present record supports only the finding of a normal employer-employee arrangement for the following reasons:

1. The clear intent of the Merle Hinds Company, Inc., as expressed by the conduct of its president-owner, Mr. Snedden in setting up his insurance coverage in three areas was to cover all employees and it was his intent to cover Mr. Bawden as an employee.

2. The testimony adduced at the hearing, including the use of the word employee, by counsel for the plaintiff, defendant, Mr. Bawden and Mr. Snedden is only compatible with the proposition that all of the parties and their counsel were treating the arrangement as that of employer and employee.

3. That the lack of testimony relating to right of control, distinct occupation or business, kind of occupation, i.e., specialist or gen-

eralist, skill, tools and place of work, length of time, method of payment, part of the regular business, whether or not the parties believe the relationship is that of master and servant as set forth in the Restatement of Agency, §220, page 480 and the decisions of this court, is due to the fact that there was no issue on this point and all parties and their counsel believed the relationship was that of master and servant.

4. That the burden of asserting and proving the affirmative defense of an independent contractor relationship is on the Plaintiff Merle Hinds Company, Inc., which it failed to do.

5. That on the record the Industrial Commission could only conclude that the relationship was that of employer and employee.

POINT III.

THE INDUSTRIAL COMMISSION APPLIED THE SAME STANDARD TO THIS NON-COVERAGE CASE AS THEY DO TO A COVERAGE CASE.

Plaintiff cites the Industrial Commission case of *Dal Mar W. Davis v. KUTV, Inc., and the State Insurance Fund, Claim* No. 6147 (R. 177) in support of the proposition that Harold Bawden did not have an "accident" since "applicant lifted no weight. He did not slip or fall. The cable incident required no unusual exertion." The case falls upon its own wording. We direct the

court's attention to the fact that the Davis incident required *no unusual exertion.* The Commission clearly found that, Mr. Bawden "was engaged in activities *unusual to him;* i. e., assising in getting out an order. In so doing, it required that he crouch low on his haunches in order to examine a low stocked row of merchandise. Such *unusual position* created an *unusual* strain on the knee which in turn created a split knee cartilage." (R. 167) (Emphasis ours)

We submit that this is an injury by accident arising out of or in the course of his employment.

CONCLUSION

We submit that the Industrial Commission has not acted without or in excess of its powers, and that its findings of fact based upon competent credible evidence fully support the award and should be sustained and affirmed by this court.

Respectfully submitted,

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