

1964

## Robert Lukus v. Industrial Commission of Utah : Brief of Plaintiff

Utah Supreme Court

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A. Pratt Kesler; Attorney for the Industrial Commission of Utah, Defendant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT LUKUS,

Plaintiff,

FILED

FEB 13 1964

-VS-

THE INDUSTRIAL COMMISSION OF UTAH

Clerk, Supreme Court, Utah Case

No. 10029

Defendant.

BRIEF OF ROBERT LUKUS, PLAINTIFF

APPEAL FROM AN ORDER OF THE INDUSTRIAL COMMISSION  
OF UTAH, HONORABLE OTTO A. WIESLEY, REFEREE

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## **I N D E X**

	<b>Page</b>
<b>NATURE OF THE CASE .....</b>	<b>1</b>
<b>DISPOSITION IN INDUSTRIAL COMMISSION .....</b>	<b>1</b>
<b>RELIEF SOUGHT ON APPEAL .....</b>	<b>2</b>
<b>STATEMENT OF FACTS .....</b>	<b>2</b>
<b>ARGUMENT</b>	
<b>POINT I. THE INDUSTRIAL COMMISSION INCORRECTLY APPLIED THE FACTS TO THE "RIGHT OF CONTROL TEST" AND ARRIVED AT AN ERRONEOUS CONCLUSION OF LAW .....</b>	<b>5</b>
<b>POINT II. THE POLICY OF THE WORKMEN'S COMPENSATION ACT AND THE INTENT OF THE UTAH LEGISLATURE ARE CONTRAVENED BY THE INDUSTRIAL COMMISSION'S ORDER DENYING THE CLAIM ..</b>	<b>10</b>
<b>POINT III. THE PLAINTIFF'S RIGHTS WERE PREJUDICED BY FAILURE TO GIVE NOTICE OF THE FILING OF RAY TOWNSLEY'S DEPOSITION PURSUANT TO UTAH RULES OF CIVIL PROCEDURE 30 (f) (3) AND DENIAL OF A COPY OF SAID DEPOSITION .....</b>	<b>12</b>
<b>CONCLUSION .....</b>	<b>14</b>

### **CASES CITED**

**James v. California Packing Corp. (1952),  
121 Utah 612, 244 P. 2d 640 ..... 11**

**Maryland Casualty Company v. Industrial  
Commission of Utah (1961), 12 Utah 2d**

**223, 364 P. 2d 1020 ..... 5, 9, 11**

## INDEX — Continued

Spencer v. Industrial Commission (1955), 4  
Utah 2d 185, 290 P.2d 692 ..... 11

Sutton v. Industrial Commission of Utah  
(1959), 9 Utah 2d 339, 344 P.2d 538..... 6

### STATUTES

Utah Code Annotated 1953, 35-1-42 (2)..... 10,11

Utah Rules of Civil Procedure, Rule 30 (f) (3).13

IN THE SUPREME COURT OF THE STATE OF UTAH

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ROBERT LUKUS,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH,

Defendant.

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)  
)  
) Case  
No. 10029  
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)

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BRIEF OF ROBERT LUKUS -- PLAINTIFF

NATURE OF CASE

The Plaintiff brought this action to recover statutory workman's compensation for injury received in an industrial accident whereby his right index finger was severed while he was employed by the Mountain States Drilling Company, Inc.

DISPOSITION IN INDUSTRIAL COMMISSION

The Plaintiff's Application for Hearing to

Settle Industrial Accident Claim came on to be heard on July 16, 1963, and the Defendant, Industrial Commission of Utah issued its Order denying the applicant's claim on August 15, 1963. Within twenty days of receiving written notice of the said Commission's decision, Plaintiff filed his Application for Rehearing. On the 25th day of November, 1963, Plaintiff received written notice that a Rehearing was denied.

### RELIEF SOUGHT ON APPEAL

The Plaintiff seeks to have this Court reverse the Defendants' Order denying Workman's Compensation; and to make an award to Plaintiff based on the injury sustained, or in the alternative, to order a Rehearing to determine Plaintiff's statutory loss and compensation due.

### STATEMENT OF FACTS

The Plaintiff was called by Mr. Ray Tomasley, Toolpusher for Mountain States Drilling Co., Inc.

Mr. Tomasley requested that the Plaintiff come to

the Kanab Creek Unit, Utah, of Mountain States Drilling Co., Inc. to do welding for said Company on an hourly basis. The Plaintiff reported for work at 10:00 a.m. on December 26, 1962, as requested. (R. 53,86) He drove there in his own pickup and used his portable welder to do the work. He had not done welding for others, nor used the welder in business for several years (R.46,62). Mr. Tounsley directed him to a well casing and informed him that it had to be cut so that the same could be plugged (R.45). Said casing was under water so the Plaintiff, assisted by other company employees, bailed water off the casing. The Plaintiff then cut the casing and welded in a plug. Mr. Tounsley inspected this work, approved it and Plaintiff was directed to cut lugs off an iron collar. Next, Mr. Tounsley directed Plaintiff to the steel oil rig frame that needed a cross piece welded in. Mr. Tounsley assisted the Plaintiff by finding the necessary cross piece. Other

piece in place while the Plaintiff welded it to the appropriate place (R.46). Following this, Mr. Tomsley asked the Plaintiff to weld a head on a large screw bolt so the same could be removed from the equipment in which it was screwed. Mr. Tomsley was then able to remove the bolt involved by using a wrench. At this point, Mr. Tomsley directed the Plaintiff to his fifty project of the day. This project was to cut a large valve off a sludge tank on the well rig. Mr. Tomsley said the pipes were empty (R.46). The Plaintiff began cutting. The valve, filled with heavy deposits, fell on Plaintiff's right hand cutting off his index finger (R.46,47). Plaintiff's permanent loss of function is comparable to the statutory loss of the index finger at the distal joint (R.41,95). A few days later, Mr. Tomsley called the Plaintiff and requested him to submit a bill in the form of a time card addressed to Superior Oil Company (R.48,54). The Superior Oil Company paid the \$30.00 bill and did not withhold any income tax or social security



## A R G U M E N T

### Point I

THE INDUSTRIAL COMMISSION INCORRECTLY APPLIED THE FACTS TO THE "RIGHT OF CONTROL TEST" AND ARRIVED AT AN ERRONEOUS CONCLUSION OF LAW.

The Defendant Industrial Commission's Order states that "The test of employer-employee relationships is the right to control the details of the work." Plaintiff agrees that the Supreme Court of Utah has adopted and applied "The Right of Control Test" to distinguish between employee and independent contractor status. In two recent cases, the Supreme Court has described this test as follows:

"Generally speaking, an employee is one who is hired and paid at some designated rate, usually specified as a wage or salary, to do work that is a part of the trade or business of his employer, and is subject to continuous supervision, direction or control in performing his duty; whereas, an independent contractor is usually engaged to do some particular piece of work, for a set sum for the completed job, and is not subject to such supervision, direction or control, but may pursue the work in his own way, and is responsible for completing it as required by his contract." Maryland Casualty Company v. Industrial Commission of

Sutton -vs- Industrial Commission of Utah, 9 Utah  
2d 339, 344 P.2d 538 (1959).

The Plaintiff was hired by Mr. Townsley at a wage to be based on an hourly charge. He requested \$6.00 per hour which was approximately the Union Scale in the Kanab area. Payment was made on that basis without objection. Welding is an integral part of the business of well drilling in which the employer was engaged. When the applicant reported on the job, he knew only that he was to do some welding. This particular project was a type of work he had never done before and was unfamiliar to him. The employer supervised, directed and controlled the performance of duties on the plugging job as well as supplying the materials for doing the work. This was also the case with four other individual and distinct jobs which the Plaintiff was requested to do and did perform. Mr. Townsley was on hand to initiate the jobs and he explained the specifications pertaining to them.

**The Defendant Commission states that "the**

Plaintiff agreed to do a job." Actually, the Plaintiff was not engaged to do a particular piece of work or job. He was engaged to do a particular type of work, that is, welding. He performed five different and varying pieces of welding work. No sum was set for each job to be completed. The Plaintiff was unaware of what welding job he was going to do next, until advised by the Employer. He was subject to Mr. Townsley's supervision, direction and control and was responsible for completing each project as required by Mr. Townsley.

It is obvious that the Employer, acting by and through Mr. Townsley, retained the right to control the details of the work and did exercise said right. Otherwise, the Plaintiff would not have known where to go or how to proceed. The Defendant Commission states in its Order that "There is a definite background history of independent contractor relationship." This could only refer to some other fact situation where this Employer was involved. Prior relationships with others is not indicative of the relationship in

This was the first and only occasion where this Employer hired this Plaintiff.

The Defendant Commission further states that "The fact that the bid was on an hourly basis does not change the relationship...." Actually, there was no bid. The Plaintiff was hired on an hourly basis at whatever was fair and reasonable for that type of work. Sometime after the accident, Mr. Townsley called for a bill and said to "make it in the form of a time card." The Plaintiff submitted in writing, with Mr. Townsley's approval, the amount he felt was fair and reasonable to cover his labor and some travel expense. For convenience, the same was submitted on an invoice from which the Plaintiff used when he was doing a different kind of work, which had been discontinued some eight years previous. The bill was not submitted before starting work, but after the accident. This is far afield from a bid as the same is denominated in the usual course of business involving independent contractors.

In support of its conclusion, the Defendant Commission has placed great emphasis on the fact that Plaintiff supplied his own tools and transportation. However, the facts of this case are basically the same as those in Maryland Casualty Company v. Industrial Commission of Utah, (1961) 12 Utah 2d 223, 364 P2d 1020.

In that case, Utah Power & Light Company engaged Soil Engineers, Dames and Moore. The latter engaged O'Brien and Phisackles to provide and operate a cable tool drilling rig and crew for drilling and sampling soil strata. In this case, The Superior Oil Company engaged Mountain States Drilling Company, Inc. The latter engaged Plaintiff to provide and operate a portable welding rig for cutting and welding work. There, payment was to be made by shift, rather than for a completed job. Here, payment was to be made by the hour, rather than for a completed job.

In both cases, the claimants were not carried

social security was withheld in either case.

Danes and Moore kept a supervisor, Nelson, on the job. He gave directions where to set up the rig and to dig the hole; how deep they should dig, when to bail out and clean the hole, when and where to take samples; when to stop and when to resume drilling. Mountain States kept a supervisor, Tomsley, on the job. He gave directions where to set up the welding rig and do the welding, how deep to cut, when to bail out the hole; and when and where to weld or cut. O'Brien was injured and held to be an employee within the meaning of Utah Code Annotated, 35-1-42 (2) 1953. The instant Plaintiff was injured. Only one conclusion follows. He, too, was an employee within the statutory meaning.

## POINT II

THE POLICY OF THE WORKMEN'S COMPENSATION ACT AND THE INTENT OF THE UTAH LEGISLATURE ARE CONTRAVENED BY THE INDUSTRIAL COMMISSION'S ORDER DENYING THE CLAIM.

The Utah Legislature made provision for resolu-

"...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 subcontractors 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 engaged in the performance of any work for another, who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the 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." Utah Code Annotated, 35-1-42 (2) (1953)

With reference to the above statutory provision, the Utah Supreme Court has often stated and held that its objective is to alleviate economic hardship upon workers due to industrial injuries and that the Act should be liberally construed in favor of coverage of the claimant. James -vs- California Packing Corp. 121 Utah 612, 244 P. 2d 640 (1952), Spencer -vs- Industrial Commission, 4 Utah 2d 185, 290 P.2d 692 (1955) and Maryland Casualty Company -vs-

Industrial Commission of Utah, 12 Utah 2d 223, 364,  
P.2d 1020 (1961).

The policy, intent, and objectives as set forth above dictate that under the circumstances of this case, a finding in favor of the Plaintiff would be just and reasonable. The Plaintiff has suffered extensive economic hardship due to the loss of use of his right index finger. This will be a continuing hardship due to permanent partial disability. The Defendant Commission has chosen to be unliberal in its construction of the Statute and has construed the same against coverage of the Plaintiff. When compared with the facts of right of control and exercise of the same by the employer, the facts that Plaintiff used his own welder and vehicle and submitted a bill for labor do not warrant denial of his claim.

### POINT III

THE PLAINTIFF'S RIGHTS WERE PREJUDICED BY FAILURE TO  
GIVE NOTICE OF THE FILING OF RAY TOMSLEY'S DEPOSITION  
PURSUANT TO UTAH RULES OF CIVIL PROCEDURE 30 (f)



**(3) AND DENIAL OF A COPY OF SAID DEPOSITION.**

Under date of June 4, 1963, Plaintiff received a Notice of Taking of Deposition from Charles Walsh, Jr., Attorney for The State Insurance Fund. Said Notice stated "....that on June 19, 1963, at 3:00 p.m., and continuing thereafter until completed, The State Insurance Fund and the Mountain States Drilling Company will take the Deposition of Ray Tennesley, before Burke Chapman, Court Reporter, at the County Courthouse, Montezuma County, Colorado.") Due to his poor financial condition, Plaintiff was not present nor represented by counsel when the Deposition was taken. The Deposition was to be taken on oral interrogatories pursuant to Rules 26 and 30 of Utah Rules of Civil Procedure. Rule 30 (f) (3) of the Utah Rules of Civil Procedure provides:

"The party taking the deposition shall give prompt notice of its filing to all other parties."

The Plaintiff did not receive prompt notice of the filing of said Deposition, in fact, he did

not receive any Notice whatsoever. When the Plaintiff appeared for the Hearing on July 16, 1963, Mr. Welch handed him a document stating that it was the deposition of Ray Townsley. The Plaintiff was requested to look at the same. He had time to look at the first page before the Defendant Commission appeared to begin the Hearing. The document was returned to Mr. Welch at that time. That was the full extent of the Plaintiff's access to the Deposition of the Defendants' chief witness. The Deposition was marked as an exhibit and received in evidence. It is now a part of the record upon which the Defendant Commission's decision is based. Plaintiff, to his detriment, has not had an opportunity to controvert the same.

#### CONCLUSION

We respectfully submit that based on the files and records in the herein, the Defendant Industrial Commission improperly denied the Plaintiff's claim, and its decision should be reversed by this Court.

**GUSTIN, RICHARDS & MATSSON**  
**Attorneys for Robert Lukus,**  
**Plaintiff**