1964

Robert Lukus v. Industrial Commission of Utah : Defendant's Brief

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ROBERT LUKUS,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH,
Defendant.

Case No. 10029

DEFENDANT'S BRIEF

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NATURE OF THE CASE

This case, which is presented pursuant to a writ of certiorari, calls for a review by the Supreme Court of the Industrial Commission's proceedings and Order for the purpose of determining whether the Industrial Commission exceeded its power and authority and whether or not the findings of fact and evidence introduced support the Commission's decision.

DISPOSITION BEFORE INDUSTRIAL COMMISSION

The plaintiff was denied coverage of an alleged industrial accident claim and thereafter made application for a hearing to settle the industrial accident claim on the 16th

day of February, 1963. The claim came on for hearing after a postponement of the original hearing date, and the Industrial Commission made its Order denying the applicant's claim on August 15, 1963. On or about the 12th day of September, 1963, the plaintiff filed a petition for rehearing by his attorney, Norman H. Jackson, and the petition for rehearing was formally denied by the Industrial Commission on the 23rd day of September, 1963. On the 3rd day of December, 1963, a writ of certiorari was filed for review by this court.

DISPOSITION SOUGHT BY THE DEFENDANT

The defendant Industrial Commission asks that the Supreme Court affirm the Order (R. 99) of the Industrial Commission which found that at the time of the injury the plaintiff was not an employee but was in fact an independent contractor.

STATEMENT OF FACTS

On the 24th day of December, 1962, Mr. Ray Townsley called the plaintiff regarding some cutting and welding on an oil rig in the Kanab Creek Unit, Utah. On the 26th day of December the plaintiff, furnishing his own transportation and taking with him his own cutting machine and tools, arc welder, welding rod, and other supplies (R. 49, 50), arrived at the site at approximately 10:00 o'clock a.m. on the said 26th day of December, 1962 (R. 45). Plaintiff carried his own equipment, tools, and supplies in his own truck from his home in Fredonia to the site of work, which takes approximately 20 minutes. The plaintiff's regular

hourly rate for welding was $4.00, but the plaintiff was paid $6.00 an hour, pursuant to agreement, to compensate for equipment, tools, and supplies furnished, together with transportation (R. 51, 54, 55).

Mr. Townsley of Mountain States Drilling Company directed the plaintiff as to what work should be done, but left the plaintiff with full discretion and freedom as to how to do the cutting and welding of the job shown, but in no way did Mr. Townsley or any other employee of Mountain States Drilling Company or Superior Oil Company attempt to direct or control the cutting and welding which the plaintiff was doing (R. 46, 51, 52). While the plaintiff was cutting off a valve, the valve fell onto the plaintiff's right hand and cut off plaintiff's index finger, which was sewed back on by a doctor (R. 40, 41, 47). The plaintiff submitted a bill on his own contractor form showing five hours of cutting and welding at an hourly charge of $6.00, for a total payment of $30.00 (R. 80), and submitted this bill to Superior Oil Company through Mr. Ray Townsley, who was an employee of Mointain States Drilling Company. Superior Oil Company made the $30.00 payment (R. 94) without deducting federal or state withholding taxes, social security or any other withholding.

Superior Oil Company and Mountain States Drilling Company denied that the plaintiff was an employee of either or both of these companies and insist plaintiff was an independent contractor (R. 3, 4, 6, 7, 8, 25). Thereupon plaintiff submitted an application for a hearing before the Industrial Commission for a determination of the claim

for workmen's compensation coverage (R. 9, 10). The record discloses that there was considerable correspondence between the plaintiff and the defendant, as well as the American Insurance Company, Mountain States Drilling Company and the State Insurance Fund, showing that the plaintiff was very active in proclaiming his cause (R. 11, 21, 22, 23, 24, 26, 27, 28, 29). The Industrial Commission, pursuant to request, set the matter for hearing on the 6th day of May, 1963, and sent a copy of the notice of hearing to all parties concerned, including the plaintiff (R. 30). By letter of April 29, 1963 from the Industrial Commission, notice was given to all parties concerned, including the plaintiff, that the hearing set for May 6, 1963 at 9:00 o'clock a.m., was continued without date, and that the reason for this continuance was the inability of securing a witness asked by the State Insurance Fund, who was Mr. Ray Townsley (R. 33, 34). Thereupon the plaintiff wrote to the Industrial Commission requesting another hearing date before the Commission (R. 35). Notice of taking a deposition of Mr. Ray Townsley was sent the 4th day of June, 1963, to all the interested parties, including the plaintiff (R. 36, 37). The new hearing date was set by the Industrial Commission, and notice thereof was sent on the 18th day of June, 1963, to all parties concerned, including the plaintiff, that the new hearing date was the 16th day of July, 1963 (R. 38). The plaintiff sent in a request for a physical examination by the Medical Advisory Board on the same date of July 16, 1963 (R. 39).

On the date of July 16, the plaintiff did appear before the Industrial Commission, and the other parties being

present, a hearing was held (R. 42 through 79), and the various exhibits 1 through 4 were admitted, including the deposition of Ray Townsley, also known as Eddie R. Townsley. The Order of the Commission denying the claim of the plaintiff was dated August 15, 1963, and sent to the various parties interested, including the plaintiff (R. 99). A petition and application for rehearing was filed on behalf of the plaintiff by Mr. Norman Jackson, attorney at law, on September 12, 1963. The petition for rehearing was formally denied on September 23, 1963, and a copy of the denial was sent to the interest parties, including the plaintiff, but not to his attorney, Mr. Norman Jackson (R. 101, 102). On September 27, Mr. Norman Jackson sent a letter to the Industrial Commission, enclosing therewith his brief (R. 103 through 111). There is correspondence between Mr. Jackson and the Industrial Commission from October 2 to November 19, 1963, concerning the petition for rehearing and its denial (R. 112 through 115). The writ of certiorari was filed December 3, 1963 in the Utah Supreme Court (R. 116).

On February 3, 1964, plaintiff brought a motion before the Supreme Court to have parties defendant, to wit, Mountain States Drilling Company, Inc., State Insurance Fund, Superior Oil Company, and Associated Indemnity Company, added as co-parties defendant. The defendant Industrial Commission answered the motion and requested that the motion to amend and bring in additional parties be denied, and furthermore, prayed that the writ of certiorari be dismissed with costs. The Supreme Court denied plaintiff's motion to add parties defendant, and the relief prayed

for by defendant Industrial Commission as to dismissal of the writ of certiorari is reserved for final determination in this matter.

All notices and communications between the parties in the record were by mail as evidenced by Exhibit A of defendant's answer to plaintiff's motion.

ARGUMENT

POINT I.

DEFENDANT'S ANSWER TO PLAINTIFF'S MOTION SHOULD BE GRANTED AND THE WRIT OF CERTIORARI OF PLAINTIFF BE DISMISSED.

The exclusive remedy for a writ of certiorari is stated in Section 35-1-83, U. C. A. 1953, as follows:

> "Within *thirty* days after *notice* that the application for a rehearing is denied, or, if the application is granted within thirty days after notice of the rendition of the decision on the rehearing, any party including the commission of finance affected thereby may apply to the Supreme Court for a writ of certiorari for the purpose of having the lawfulness of the original award or the award on rehearing inquired into and determined." (Emphasis added.)

This section has had an interesting background prior to the amendment of this section which theretofore did not require notice of the denial of the application for rehearing.

The Utah Supreme Court in *Woldberg* v. *Industrial Commission*, 74 Utah 309, 279 Pac. 609, required, and in

Heledakis v. *Industrial Commission,* 66 Utah 608, 245 Pac. 334, stated, that it was mandatory that for a writ of certiorari to be considered properly by this court, said writ had to be filed within thirty days after the denial of the petition for rehearing.

In *Utah Fuel Company* v. *Industrial Commission,* 73 Utah 199, 273 Pac. 306, a writ of certiorari was denied to the plaintiff on the basis that the writ had not been filed within thirty days after the denial of a petition for rehearing, and even though an affidavit did show that the counsel for plaintiff was not given notice of such denial and that plaintiff himself was not given notice of the denial, and even though counsel for plaintiff had appeared at the office of the Industrial Commission within 30 days after plaintiff's motion for rehearing was denied, to inquire about the decision of the case, and counsel was informed erroneously that no ruling or decision had been made, and in fact counsel did not receive notice until after the thirty days had expired, the Utah Supreme Court ruled that the thirty-day period was a mandatory rule for jurisdiction and that since it had not been complied with, the Utah Supreme Court could not take jurisdiction, and dismissed the writ. The rule definitely seems to be that, although harsh, the thirty-day period must be complied with or else jurisdiction is lost.

In *Spencer* v. *Industrial Commission,* 4 Utah 2d 185, 290 P. 2d 692, the following statement was made:

> "* * * The act provides that a party aggrieved by the action of the Commission may apply

> for a rehearing or seek a review in this court within times prescribed by law. This is the exclusive means of securing a review of a determination made on any given state of facts. * * *" P. 694.

Therefore, since the statute had been complied with and notice had been given to the plaintiff, which is certified pursuant to Exhibit A attached to the answer of defendant to plaintiff's motion, there is no jurisdiction for this court and the writ of certiorari should be dismissed.

The Industrial Commission is excused by statute from following rules of civil procedure in Section 35-1-88, U. C. A. 1953, as follows:

> "The commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided; but may make its investigations in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title."

Therefore, even though Section 35-1-83, U. C. A. 1953, requires notice to be given, the notice contemplated is the notice to the claimant himself, which was given pursuant to Exhibit A of defendant's answer to plaintiff's motion, which was heard on February 3, 1964, and no notice need be given to the attorney as required in Rule 5(b)(1) of the Utah Rules of Civil Procedure.

It should be noted that Rule 5(b)(1) of the Utah Rules of Civil Procedure reads as follows:

> "*Whenever under these rules service* is required or permitted to be made upon a party represented by an attorney * * *." (Emphasis added.)

There is no civil rule of procedure in Utah requiring notice to be served upon plaintiff or his attorney by the defendant Industrial Commission, and therefore Rule 5(b)(1) does not apply, and the notice to claimant is deemed a valid notice, as were all other notices and communications directly between the plaintiff and defendant. The only requirement of Section 35-1-83, U. C. A. 1953, is notice to the claimant, plaintiff in this instance, and any other requirement by this court would in effect be a legislative change of the statute.

POINT II.

THE FINDINGS AND ORDER OF THE INDUSTRIAL COMMISSION ARE BASED UPON SUFFICIENT COMPETENT EVIDENCE AND SHOULD NOT BE OVERRULED.

It has been well reasoned by the Supreme Court that pursuant to Section 35-1-84, U. C. A. 1953, only if all the evidence is contrary to the findings of fact by the Industrial Commission will said Commission be reversed. There are numerous cases decided by the Supreme Court indicating that this is the general rule of law.

In *Sutton, et al.*, v. *Industrial Commission,* 9 Utah 2d 339, 344 P. 2d 538, the Supreme Court held that as long as there is any credible evidence in the record to sustain the findings of the Commission, this is sufficient to uphold the

Commission, and that there is no arbitrariness or capriciousness in its decision.

It should be noted that in this particular case the plaintiff testified that he was being paid $6.00 an hour for the work for Superior Oil Company, and that his usual charge was $4.00 an hour (R. 54, 55), and that the additional takes care of the equipment and supplies (R. 48, 49, 51).

In the case of *Christean* v. *Industrial Commission,* 113 Utah 451, 196 P. 2d 502, the court discusses the matter of employee versus independent contractor, and quotes from the Restatement of the Law of Agency, Par. 220, page 483, as found therein as follows:

> "(1) A servant is a person employed to perform service for another in his affairs and who, with respect to this physical conduct in the performance of the service, is subject to the other's control or right to control.
>
> "(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> "a. The extent of control which, by the agreement, the master may exercise over the details of the work;
>
> "b. whether or not the employed is engaged in a distinct occupation or business;
>
> "c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"d. the skill required in the particular occupation;

"e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"f. the length of time for which the person is employed;

"g. the method of payment, whether by the time or by the job;

"h. whether or not the work is a part of the regular business of the employer; and

"i. whether or not the parties believe they are creating the relationship of master and servant." (Quoted from 196 P. 2d p. 505.)

In *Maryland Casualty Co.* v. *Industrial Commission of Utah,* 12 U. 2d 223, 364 P. 2d 1020, on page 224 the court stated:

"The court has on numerous occasions been concerned with the question whether one performing service for another was an employee, and therefore covered by the Workmen's Compensation Act, or an independent contractor. What the relationship is depends upon the particular fact situation. It is the prerogative and the responsibility of the Commission to make this determination and it is so well established as to hardly justify repetition that its action will be sustained if there is any substantial credible evidence to support it so that it cannot properly be classified as capricious or arbitrary."

The mere fact that Mr. Townsley, who is an employee of Mountain States Drilling Company, demonstrated to the plaintiff the work to be done, was not the type of control

which would make the plaintiff an employee in lieu of an independent contractor. There is no indication that Mr. Townsley was a welder or knew anything about welding, in order to exercise control as to the exact manner of performing the work, and there is indication (R. 51, 52) that the plaintiff did have some activity as a professional welder, and that the plaintiff alone was responsible for the detail of welding. When there is any credible evidence to sustain an Industrial Commission finding, it is this court's duty to affirm the Commission. *Sutton* v. *Industrial Commission,* supra; 35-1-84, U. C. A. 1953.

In *Burton* v. *Industrial Commission,* 13 Utah 2d 353, 374 P. 2d 439, this court said at page 554:

> "In order to reverse the finding and order made Plaintiff must show that there is such credible uncontradicted evidence in her favor that the Commission's refusal to so find was capricious and arbitrary."

See also *Morris* v. *Industrial Commission,* 90 Utah 256, 61 P. 2d 415; *Stover Bedding Co.* v. *Industrial Commission,* 99 Utah 423, 107 P. 2d 1027; 134 A. L. R. 1006.

The mere fact of showing the plaintiff what work was needed was not exercising control so as to make the plaintiff an employee. Every independent contractor has to be shown and given orders as to when and where certain work will be done and then performs his skill without control. *Gogoff* v. *Industrial Commission,* 77 Utah 355, 296 P. 229.

Furthermore, the evidence shows that the plaintiff had all the equipment and supplies of a welder (R. 49, 50,

51), and that the two alleged employers did not have such equipment (R. 50), and that the plaintiff had been a professional welder in a separate occupation to that of either alleged employer who were in the business of oil drilling. *Parkinson* v. *Industrial Commission,* 110 U. 309, 172 P. 2d 136. The plaintiff was paid $2.00 an hour for his special skill and for furnishing his own equipment, tools, supplies, and transportation.

The distinction hereinabove made is set forth in the *Christean* v. *Industrial Commission* case wherein the court quotes from the Restatement of the Law of Agency, Par. 220, page 485:

> "* * * The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants. They may be agents, agreeing only to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal; or they may be persons employed to accomplish or to use care to accomplish physical results, without fiduciary obligations, as where a contractor is paid to build a house. An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results.
>
> * * *"

(Quoted from 196 P. 2d, p. 513.)

We submit that in the case now before the court there was substantial evidence to support the findings and Order of the Commission, and that said findings and Order should be affirmed.

POINT III.

THE PLAINTIFF HAS NOT SHOWN THAT THE DEPOSITION OF RAY TOWNSLEY IS INCORRECT OR EVEN THAT IT IS INJURIOUS TO THE RELIEF SOUGHT BY THE PLAINTIFF AND THE DEPOSITION WAS CORRECTLY ADMITTED BY THE INDUSTRIAL COMMISSION.

It should be noted that notice was given to plaintiff of the taking of a deposition of Mr. Ray Townsley and that at this time the plaintiff was not represented by counsel. The deposition was taken under Rules 26 and 30 of the Utah Rules of Civil Procedure, and there is no indication other than the failure to give notice that this deposition was contrary to the interests of the plaintiff. The Utah Rules of Civil Procedure, pursuant to 32(d), as well as the federal rule, require that a motion to suppress must be made within a reasonable time of any deposition, etc., which is irregularly filed, etc., or the party waives his right to object, if any objection he has. Barron & Holtzoff, *Federal Practices and Procedures,* Vol. 2A, Sec. 641-870; *Oates* v. *S. J. Groves & Sons Co.,* C. A. 6th 1957, 248 Fed. 388, 202 F. Supp. 181. The excuse given by the plaintiff was that

he did not have sufficient funds to be present at the deposition, even though Rule 30(b) of the Utah Rules of Civil Procedure was not invoked by plaintiff, and yet plaintiff requested that Mr. Ray Townsley be present to testify before the Commission without any showing of the manner or method by which Mr. Townsley's presence would be obtained or paid for. There appears no definite point of proof that the plaintiff is requesting from the deposition or testimony of Mr. Townsley nor is there any showing or controverted evidence of the deposition which plaintiff alleges is harmful, except that no notice was given, and, therefore, the deposition was rightfully admitted by the Industrial Commission and the contents therein should and could be used for any determination by the Industrial Commission. Any right that the plaintiff may have had under Rules 30(b) and 32(d) of the Utah Rules of Civil Procedure have terminated, and the deposition of Mr. Townsley could be used and certainly should be considered as evidence by the Commission, and was rightfully admitted.

There does not seem to be any direct or positive injury to the plaintiff from the deposition of Ray Townsley, and because of Section 35-1-88, U. C. A. 1953, supra, there seems to be no need for notice to be given of filing of a deposition before the Industrial Commission, because the Act does not require it, and the Commission is not bound by the Rules of Civil Procedure, because of Section 35-1-88, U. C. A. 1953, heretofore mentioned.

CONCLUSION

For the foregoing reasons the defendant's answer to plaintiff's motion should be granted and the plaintiff's writ of certiorari dismissed for lack of jurisdiction, or in the alternative, the findings and the Order of the Industrial Commission should be affirmed by this court.

Respectfully submitted,

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