1964

Eldon P. Rowley v. The Industrial Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court

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F. A. Trottier; Attorney for Respondents;

In the Supreme Court of the State of Utah

ELDON P. ROWLEY,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH; THE STATE INSURANCE FUND; and EDGEMONT DEVELOPMENT COMPANY, a Corporation.

Defendants.

CASE NO. 10053

BRIEF OF PLAINTIFF

Writ of Certiorari to Review Decision of Industrial Commission

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CASES

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NATURE OF CASE

This is an action to review the decision of the Industrial Commission made on September 30, 1963.

DISPOSITION BY INDUSTRIAL COMMISSION

The Industrial Commission concluded that plaintiff's accident did not arise out of or in the course of his employment, and denied plaintiff's claim upon that ground.

RELIEF SOUGHT BY PLAINTIFF

Upon the Writ heretofore issued by the Supreme Court, plaintiff seeks a review of the decision of the Industrial Commission and a reversal of the Commission's Order of September 30, 1963, denying plaintiff's claim.

STATEMENT OF FACTS

On May 18, 1962, plaintiff filed a claim with the Industrial Commission for an injury to his back (R-3). He alleged in his application that the injury arose out of or in the course of his employement. After denial of the claim by the State Insurance Fund on July 30, 1962, the matter was set for hearing by the Commission. (R-4). On November 13, 1962, a hearing was had before Clarence J. Frost, Referee. (R-11 to 35).

Subsequent to the hearing, the Referee made the following recommended findings:

> "Applicant alleges that while checking with a family that had just purchased a home from the company that he owns and operates, that he fell off a curbing, injuring his ankle and back. Applicant is a principal stockholder and manager of the company. In his capacity as manager, he alleges that he does nearly all the selling. Although the alleged injury occurred on a Sunday afternoon, the Referee believes the applicant was in the course of his employment. That it was a normal procedure to check with the purchaser of a home especially in light of the fact that the applicant's company had been paying a penalty for ten days because of delay in construction. At the exact time of the fall there is some question as to whether the applicant had departed from his employ-

ment. The Referee contends that there was no departure and if there were, it was of a minor and insignificant nature.

"However, in light of the records and testimony indicating previous serious difficulty with applicant's back, the Referee is not convinced that the alleged accident had a significant relation to the overall condition of the applicant's back.

"The Referee makes the following findings:

1. The applicant sustained an injury on December 8, 1961.

2. The injury resulted from an accident arising out of or in the course of employment.

"The Referee further recommends that the medical aspects of this case be referred to a medical panel." (R-38).

Six days later on January 14, 1963, the Commission adopted the Findings of Fact and Conclusions of Law of the Referee as the Findings and Conclusions of the Industrial Commission. (R-37).

Thereupon, The State Insurance Fund made application to the Commission for a re-hearing, which was granted on February 28, 1963 (R-40). A re-hearing was had before Otto A. Wiesley, Referee, on May 20, 1963, and on September 30, 1963, the Commission made an order denying plaintiff's claim, (R-60), which order reads in part as follows:

"The Commission does not disagree with the Referee's finding that an accident occurred as alleged nor do we reject the panel findings and conclusion.

"The Commission finds and concludes that the accident did not arise out of or in the course of applicant's employment. We base our conclusions on the Utah Supreme Court decision in **Sullivan** vs. **Industrial Commission,** 79 U 317, 2 Pac. 2d 924. The Court said:

'Though an employee is, by terms of his employment, required to be ready to perform his duties for his employer at any hour of the day or night, it does not follow that every accident or injury that he may receive during the course of the 24 hours arises out of his employment. To be compensable, it must aupear that at the time of the injury he was discharging some of the duties he was employed to perform, **or that he was doing something in some way connected with or incidental to the duty owing to the master.'"** (Emphasis supplied)

Complying with the statutes, plaintiff filed a Petition for Re-hearing on October 28, 1963, (R-63), which was denied by the Commission on December 9, 1963 (R-64). Upon application of the plaintiff, an Extraordinary Writ in the Nature of Certiorari was duly issued by this Honorable Court and served upon the defendants on January 8, 1964.

The only factual findings bearing upon the question as to whether or not plaintiff's injury arose out of or in the course of his employment appear in the Recommended Findings of Fact of Clarence J. Frost, Referee, dated January 8, 1963, quoted above, which Recommended Findings were adopted by the Commission on January 14, 1963. It will be noted that the decision of the Commission dated September 30, 1963, denying plaintiff's claim simply re-

verses its prior conclusion that the injury did not arise out of or in the course of plaintiff's employment and recites no factual matters beyond the following:

> "The Commission does not disagree with the Referee's findings that an accident occurred as alleged nor do we reject the panel findings and conclusions." (R-60).

The fact that an injury occurred and the manner in which it happened are not in dispute. The record is quite clear that plaintiff substantially owned and controlled Edgemont Development Company, (R-17) and was its acting manager (R-20). The Company was in the business of building and selling houses and both the building and selling were done by plaintiff for the Corporation. (R-20). There is no disagreement either, that plaintiff went to the home of James A. Jensen who had purchased the home from Edgemont Development Company, for the purpose of seeing that all of the utilities, such as the power, gas and all of the things within the house were working properly so that it would be livable (R-13). This was a normal procedure and was especially justified in this case because the Company had been paying a penalty for construction delay for about ten days previous (R-26). Likewise, there is no dispute that Mr. Jensen's car was stuck in the snow and that plaintiff instructed his boy to get a tractor which was owned by plaintiff's employer and pull Mr. Jensen's car out (R-32). Unfortunately, however, the boy couldn't start the tractor so plaintiff started to walk in the direction of the tractor to see what the difficulty was and when he reached the curbing in front of the house he slipped and fell, sustaining injury (R-14-15).

STATEMENT OF POINTS

POINT I

PLAINTIFF'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

ARGUMENT

POINT I

PLAINTIFF'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

Although it is not entirely clear from the orders of the Commission above referred to, it seems to be the Commission's position that there was a dearture from his employment when plaintiff started for the tractor. This conclusion of law was apparently reached on the theory that the walk to the tractor was for a purpose foreign and not incidental to any duty owed to his employer, and therefore, when the first step was taken toward the tractor plaintiff was no longer in the course of his employment.

We submit that neither logic, reason, nor the decided cases support such a conclusion.

The plaintiff himself put it very succinctly at the hearing when he said:

> "Mr. Frost, the reason that I have belabored the point of what I have done for the people was to establish the fact that when we were assisting him in getting his car out of the stuck position it was necessary to keep and maintain good public relations. How would anyone look toward me, as a salesman—or in this particular case, Mr. Jensen—if I had said: 'I am

sorry I can't help you get your car out of there. You are going to have to hire someone to come up from town and pull you out of there,' when within sight of both of us is the tractor." (R-32).

On pages 32 and 33 of the record appears the following:

"THE REFEREE: I don't want to argue with you at this point, but I mean we have got a situation here where, whether you are a friend or whether you are a no good, if you volunteer and do something for somebody you don't have to do, you're not in the course of your employment. Now I'm not saying that is what you did, but this is the thing it looks like to me that it's got to come down to, to decide that point."

"MR. ROWLEY: Well, that is the position I thought The Insurance Fund was taking, and I'm trying to establish the fact that it was necessary for me to help him get his car out of the position that it was in, in order to maintain good public relations. Because all of my homes have been sold, or the bulk of my homes have been sold, as a result of the relationship that existed between me and previous buyers. For instance we have taken people in Mr. Jensen's house, and as a result of that I have sold other houses. Because Mr. Jensen was satisfied, and because of the way I treated him, is the reason he was satisfied. And I am sure if I had walked off and left him stuck, with it snowing the way it was, he couldn't have had a good attitude toward the Edgemont Development Company and myself. And I don't know of anyone that could."

"THE REFEREE: Well, I think that you have got your point over very well. I think that you have

made us understand what your position is, and I think that you have done a good job."

Among other things, the Commission's conclusion ignores the fact that the tractor was owned by Edgemont Development Company and that plaintiff, as its manager, salesman, and builder, made the decision that to help Mr. Jensen get out of the snow was in furtherance of the Company's interests. Certainly, if the boy had been an employee and he had suffered injury, he would have been in the course of his employment. Does it make any legal difference that the manager of the company, on the same mission, was the person injured?

In the case of **Stroud** vs. **Industrial Commission,** 272 Pac. 2d 187, this Court held that where a police officer, on his day off, arranged with two other officers to check out to them, in his capacity as a Sgt., a special police car, and while waiting for such officers, accidentally discharged his revolver killing himself while assisting another officer to transfer cases of beverages to his automobile for transportation to a police benefit party, the accident "arose out of" and "in the course of" his employment.

The case of **Sullivan** vs. **Industrial Commission,** Supra, relied upon by the Commission, is not in point. As this Court said about the **Sullivan** case in the **Stroud** case:

> "Clearly the case stands for the proposition that an employee on 24 hour call is not covered by Workman's Compensation Acts where he deviates from the purposes of his employment, but it cannot be authority upon which to determine that Stroud, under different circumstances, had stepped outside his employment after having entered upon it by undertaking a simple task not connected with that employment."

We believe plaintiff's case is stronger than the Stroud case because the task which the plaintiff undertook was actually in the furtherance of his employer's business and not outside of it. In any event, if it could possibly be said that when plaintiff started for the tractor there was a departure from his employment, such departure was insignificant and immaterial. (See **Twin Peaks Canning Company, et al** vs. **Industrial Commission,** 196 Pac. 853; **Thompson** vs. **Industrial Commission,** 27 Pac. 2d 436; **Morgan** vs. **Industrial Commission,** 66 Pac. 2d 144; **Fintzel** vs. **Stoddard Tractor and Equipment Company, 260** N.W. 725; **Commercial Casualty Insurance Company** vs. **Strong,** 44 S.W. 2d 805).

CONCLUSION

In conclusion,, we respectfully submit that the Order of the Commission dated September 30, 1963, denying plaintiff's claim upon the ground that the injury did not arise out of or in the course of his employment should be reversed.

Respectfully submitted,

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