

1983

## **Board Of Education of Alpine School District v. Industrial Commission Of Utah And Wayne A. Olsen : Brief of Plaintiff**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BOARD OF EDUCATION OF	)	
ALPINE SCHOOL DISTRICT,	)	
	)	
Plaintiff-Appellant,	)	Case No. 19076
	)	
vs.	)	
	)	
INDUSTRIAL COMMISSION OF	)	
UTAH and WAYNE A. OLSEN,	)	
	)	
Defendants-Respondents.	)	

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BRIEF OF PLAINTIFF

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ORIGINAL ACTION TO REVIEW THE PROCEEDINGS AND  
ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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INDUSTRIAL COMMISSION OF	)	
UTAH and WAYNE A. OLSEN,	)	
	)	
Defendants-Respondents.	)	

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BRIEF OF PLAINTIFF

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STATEMENT OF THE NATURE OF THE CASE

This action involves a determination by the Industrial Commission that defendant Olsen has sustained a compensable industrial injury, which determination is contested by plaintiff.

DISPOSITION OF THE CASE BEFORE THE INDUSTRIAL COMMISSION

This case was heard by an Industrial Commission administrative law judge on October 1, 1982. On October 5, 1982, an order awarding Defendant Olsen certain benefits was entered by the Commission.

A Motion Requesting Transcript of Hearing and Extension of Time for Filing of Motion for Review was filed on October 20, 1982. A Motion for Review was filed by the plaintiff-appellant on December 10, 1982. Appellant's Motion for Review was denied an Order of the Industrial Commission of Utah dated February 24, 1983. A Petition for Review was filed on March 23, 1983 in the Supreme Court of the State of Utah.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have this Court determine that defendant Olsen was a volunteer and not an employee of plaintiff at the time he sustained his injury and that a volunteer is not entitled to compensation benefits under the Utah Workmans Compensation Act.

## STATEMENT OF FACTS

Mr. Wayne A. Olsen, defendant-respondant, is a carpenter contractor. In the fall of 1981, Mr. Olsen approached his friend, Mr. David Haight, a shop teacher at Mountain View High School, about the possibility of using equipment at the High School to build a personal project. Mr. Haight agreed that Mr. Olsen could use the school's equipment so long as he didn't interfere with the student's use of the equipment. (Transcript p. 5)

While Mr. Olsen was working on his personal project, Mr. Haight informed Mr. Olsen about a County sponsored volunteer program known as RSVP (Retired Senior Volunteer Program), and asked Mr. Olsen if he would be interested in participating in this program. (Transcript, p. 6) RSVP is a County sponsored volunteer program designed to give opportunity to individuals to utilize their talents and experience for the benefit of the community. (Transcript, p. 64)

This program is neither operated nor sponsored by the plaintiff School District. The School District has agreed to allow RSVP volunteers to volunteer their time and talents in the School District. (Transcript, p. 64)

In the spring of 1982, Mr. Olsen did not have any work in his own business and he informed Mr. Haight that he would be interested in participating in the RSVP program. (Transcript, pp. 7, 9) Mr. Olsen was then interviewed by officials of Mountain View High School and informed that they would be happy to have him participate in the volunteer program at the High School. (Transcript, p. 35) At the conclusion of his interview, Mr. Olsen understood that the program in which he would be participating was a volunteer program. (Transcript, p. 35)

RSVP (County) personnel gave Mr. Olsen a lunch ticket which entitled him to a daily lunch in the school cafeteria. (Transcript, p. 15) Mr. Olsen was also allowed to continue to use the equipment in the school shop for personal projects so long as his use did not interfere with the students.

Mr. Olsen did not have a written or oral contract of employment with Mountain View High School or Board of Education of Alpine School District. (Transcript, pp. 34, 35) He did not receive any wage or monetary remuneration for his services nor did he have any expectation of being paid for his services. (Transcript, pp. 36-40)

Neither the Board of Education of Alpine School District nor Mountain View High School had any control over or right to control the hours that Mr. Olsen spent in the high school. He had no designated hours. Mr. Olsen could come and go as he pleased. (Transcript, p. 38)

Neither the Board of Education of Alpine School District nor Mountain view High School had any control over or right to control what Mr. Olsen told the students nor was he required to attend faculty meetings. (Transcript, pp. 38-39)

In April 1982, Mr. Olsen was asked by Mountain View High School to substitute teach in the School Shop class for a period of one day. Prior to substitute teaching on that day, Mr. Olsen signed the forms necessary to substitute teach for one day and at the end of the day that he taught he signed a time card. Mr. Olsen has been paid for the day that he acted as a substitute teacher. (Transcript, p. 17)

On May 20, 1982 Mr. Olsen suffered an accidental injury in the Mountain View High School Shop. Mr. Olsen's injury occurred during the lunch hour and while he was working on a personal project. (Transcript, p. 22) It is for this injury that Mr. Olsen seeks worker's compensation benefits.

#### ARGUMENT

##### POINT I

AT THE TIME OF HIS ACCIDENT, THE DEFENDANT, WAYNE A. OLSEN, WAS A VOLUNTEER AND NOT AN EMPLOYEE OF THE BOARD OF EDUCATION OF ALPINE SCHOOL DISTRICT.

Utah Code Ann. 35-1-45 provides that workmen's compensation benefits shall be paid to "Every employee. . .who is injured . . .by accident arising out of or in the course of his employment. . . ." (emphasis added)

The term "employee" is defined by Utah Code Ann. 35-1-43 as:

(1) Every elective and appointive officer, and every other person, in the service of the state, or of any county, city, town or school district within the state, serving the state, county, city,



town or school district therein under any election or appointment or under any contract of hire, express or implied, written or oral, including all officers and employees of the state institutions of learning.

The question of when one is an employee for workers compensation purposes has been dealt with in numerous Utah Supreme Court decisions. This question has generally been raised in the context of cases dealing with the distinction between employees and independent contractors; however, the same general legal principles apply to cases dealing with the distinction between employees and volunteers.

In Bingham City Corporation, et al., v. Industrial Commission of Utah, 66 Ut. 390, 243 P. 113 (1926), the Utah Supreme Court dealt with the distinction between employees and volunteers for the first time. In that case a volunteer fireman was killed in the performance of his duties and the issue before the court was whether or not the fireman was an employee of Bingham City. In addressing this issue, the court set forth the following test:

The usual test by which to determine whether one person is another's employee is whether the alleged employer possesses the power to control the other person in respect to the services performed by the latter and the power to discharge him for disobedience or misconduct. Under the Workmen's Compensation Act it is also essential that some consideration be in fact paid or payable to the employee. The purpose of the act is to provide compensation for earning power, lost in industry, and the only basis for computing compensation is the earning ability of the employee in the particular employment out of which the loss arises. In short, the term employee indicates a person hired to work for wages as the employer may direct. (emphasis added)

Applying this test, the court held that the volunteer fireman was not an employee and thus was not entitled to benefits under the Workers Compensation Act.

This test has been reiterated numerous times. In Harry L. Young & Sons, Inc., v. Ashton, Utah, 538 P.2d 316 (1975), the Utah Supreme Court stated:

Speaking in generality: an employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties.

p.318.

The intent of the parties is also one of the most important factors to consider in attempting to determine whether or not an employer-employee relationship exists. Rustler Lodge v. Industrial Commission, Utah, 562 P.2d 227 (1977).

In summary, the principal tests by which to determine whether the defendant is an employee of the Board of Education of Alpine School District or a volunteer are (1) intent of the parties, (2) power or right to control, and (3) payment of compensation.

These tests will be treated in sequence.

#### INTENT

The clear intent of the parties was that the defendant was a volunteer.

The defendant testified that he and Mr. Haight, the shop teacher, were good friends and that in the fall of 1981 Mr. Haight was allowing the defendant to use the shop equipment for his personal projects. While the defendant was working on

personal project, Mr. Haight told him about the RSVP volunteer program and asked the defendant if he would be interested in participating in this program. The defendant testified as follows:

MR. SHAUNHNESSY: Q. Now beginning in the winter of 1981, were there discussions held about what they called the RSVP program at the school?

A. As I worked on this project last fall, Mr. Haight informed me about the RSVP program. A volunteer instructor program of some sort, which is offered by the District. He explained to me that they had a fellow who had been helping them with this program. The program allowed the school to bring in an individual to help them with the instruction of regularly-scheduled classes for high school students. They had an individual who was helping with that, but his health was kind of poor and they didn't know whether he would be back after Christmas. He asked me if I might be interested in helping them out that way. I told him that I didn't know what kind of work I would have in my business, but that I would think about it and let him know after Christmas."

(Transcript, pp. 6, 7)

The defendant then testified that after the Christmas break he advised Mr. Haight that he would be interested in participating in the volunteer program. (Transcript, p. 9)

The RSVP program is a county-sponsored volunteer program. It is neither sponsored nor operated by the School District. At the request of the county, the School District has agreed to allow RSVP volunteers to volunteer services within the district.

After the defendant indicated that he was interested in participating in the RSVP program, Mr. Haight advised the claimant that it would be necessary to have him cleared by the school administration. "In case he punched a student or something, . . ."

(Transcript, pp. 9,54)

The defendant testified that in his meeting with the vice principal he was informed that the program in which he would be participating was a volunteer program. (Transcript, p. 35) He stated his own understanding as follows:

Mr. McConkie: Q. So you understood at the conclusion of that interview that you would be working in the volunteer program of the high school?

A. Yes.

(Transcript, p. 35)

#### CONTROL

The defendant presented no evidence whatsoever and there are no Findings of Fact that the School District had any control or right to control his actions. To the contrary, the record shows that the District did not have any power or right to control the defendant in respect to the services he performed.

The School District did not have any control over the hours that he spent at the school (Transcript, p. 38). The defendant could come and go as he pleased. The School District did not keep a record of his activities or hours. The defendant had neither record keeping nor reporting requirements. He wasn't required to attend Faculty meetings.

The defendant also testified that the School District did not have any right to control what he taught the students. (Transcript, pp. 38, 39)

#### PAYMENT OF COMPENSATION

The defendant did not receive any wage or remuneration for his services at the High School. No taxes were withheld and no reporting requirements were present. Furthermore, the defendant

**testified that he did not have any expectation of being paid for his services.** (Transcript pp. 39,40)

The lunch ticket that defendant was given and which entitled him to a free lunch in the school cafeteria was an RSVP lunch ticket and was given to him by RSVP personnel. The School District had an agreement with RSVP that volunteers would be given a free lunch so that volunteers wouldn't have to leave the facility or bring their lunch. The school district testified that this was just a gratuity for volunteer services.

In Hall v. State Compensation Insurance Fund, 154 Col. 47, 387 P.2d 899 (1963), the Colorado Supreme Court held that the provision of lunch to a hospital volunteer worker did not make the volunteer an employee.

In Kershaw v. Tracy Collins Bank & Trust Co., Utah, 561 P.2d 683 (1977) the court stated:

Purely voluntary services are not compensable and services rendered out of a moral obligation are not compensable. Services rendered gratuitously and without expectation by both parties that compensation be paid are not compensable.

p.685.

The decision of the Industrial Commission that there was an "implied contract of hire" between the Board of Education of Alpine School District and the defendant, Wayne A. Olsen, is arbitrary, capricious, and is not supported in law or fact.

There were no contractual relations whatever between the Board of Education of Alpine School District and the defendant. The defendant testified that he did not have a ". . .written contract of any kind. . ." with the District and that he had not

even communicated with officials of the District until after his accident. (Transcript, p. 35)

He testified further that he had an agreement with officials of Mountain View High School that he would be working in a volunteer program. In this regard, the defendant testified as follows:

Mr. McConkie: Q. Did you have an oral contract with the Alpine School District?

A. Well, I had an agreement with the vice-principals, which I assume represent the school district.

Q. Did you have any agreement with the school district itself? Officials of the school district?

A. No.

Q. Did you ever have any communications with officials of the school district?

A. Not until after my accident.

Q. You say you had an agreement with the principal, or the vice-principal, at Mountain View High School. Would you describe briefly the agreement that you had there?

A. That just came about as a result of the interview which we have mentioned, wherein they ask me personal questions, and ask for my qualifications as a woodworker. I don't remember that they asked me anything about teaching background, but they did want to know about my wood-working experience. At the conclusion of this interview, they told me that they would be glad to have me work in this volunteer program for the high school.

Q. So you understood at the conclusion of that interview that you would be working in the volunteer program of the high school?

A. Yes.

(Transcript, p.35)

In order to find that there was an implied contract between the defendant and the school district, all of the facts must be examined to determine the intention of both parties. Kershaw v. Tracy Collins Bank & Trust Co., supra. By the defendant's own admission, his understanding of his agreement reached with school officials in his meeting was that he would be working in the volunteer program of the high school.

In Rasmussen v. United States Steel Co., 1 U.2d 291, 265 P.2d 1002 (1954) the Utah Supreme Court stated:

" . . .the distinction between express and implied in fact contracts largely is a difference only in mode of expression. A contract is express or implied by reason of the expression of offer and acceptance,--whether there is a manifestation of mutual assent, by words or actions or both, which reasonably are interpretable as indicating an intention to make a bargain with certain terms or terms which reasonably may be made certain. The elements are basically identical in both cases, although the evidentiary facts may be expressed differently."

p.1004.

In McCollum v. Clothier, 121 Ut. 311, 241 P.2d 468 (1952), the court restated the general quantum meruit or implied contract rule as follows:

It is appreciated that this rule should not be applied to bind one under implied contract who merely permits services to be rendered him, or accept benefits from another, under such circumstances that he may reasonably assume they are given gratuitously. The law should not require everyone to keep on guard against such possibilities by warning persons offering services that no pay is to be expected. It is, therefore, essential that the court should exercise caution in imposing the obligations of implied contract, as contrasted to express contract, where the parties have actually defined and agreed to the

terms they are to be found by. With such caution in mind, the test for the court to apply was: Under all the evidence, were the circumstances such that the plaintiff could reasonably assume he was to be paid and that the defendant should have reasonably expected to pay for such services.  
(Emphasis added)

p. 686.

The facts of this case are clear as to what the intention of the parties was. There was no legal duty on the part of one party to the other. In his Findings of Fact, even the Administrative Law Judge recognized the volunteer status of the defendant when he stated that ". . .this case is an instance of first impression in the State of Utah since it appears that there is no provision in the Worker's Compensation Act for volunteer workers." (Findings of Fact, p.5) Certainly the claimant has not shown by preponderance of the evidence that the parties intended to create a master-servant or employee-employer relationship.

The claimant has testified that he worked for two days as a substitute teacher and that he was only paid for the second day. The first occasion was around the first part of April, 1982 and the second occasion was near the end of that same month. On the first occasion, it was necessary for the regular shop teacher to take a few of his students on a field trip. Rather than bring in a substitute teacher, the school administration requested that the shop teacher make arrangements with other teachers in the school to cover his classes for him. When the shop teacher mentioned this to the defendant, the defendant offered to cover the classes. On the second occasion the defendant testified that he was formally asked to substitute teach and that prior to teaching



he filled out necessary paper work in the school office. The defendant has been paid for the second day. The claimant also testified that while substitute teaching, his duties were different than they were on each of the other days that he served in the school. (Transcript, p. 42)

Assuming arguendo that the claimant did substitute teach for two days, this does not make the claimant an employee of the district for all other purposes and all other occasions. The most that can be said is that he was an employee on two separate occasions of one day each.

The claimant's accident did not occur on either day that the claimant claims he was substitute teaching and therefore did not arise out of or in the course of his employment as required by U.C.A. 35-1-45 (1953).

The only reasonable conclusion that can be reached from a review of all of the facts and circumstances of this case, including the claimant's own admissions, is that the claimant was a volunteer and not an employee of the Alpine School District at the time of his injury.

#### POINT II

#### WAYNE A. OLSEN, AS A VOLUNTEER WORKER, IS NOT ENTITLED TO WORKERS COMPENSATION BENEFITS

The administrative law judge took judicial notice of the fact that the legislature in two separate instances has made provisions for volunteer workers to receive workers compensation benefits. More specifically, he referred to U.C.A. §49-6A-31 wherein the legislature made provision for volunteer firemen to receive workers compensation benefits and U.C.A. §63-34-11 (1953)

wherein the legislature made provision for volunteers with the Department of Natural Resources to receive workers compensation benefits. Based upon this, the administrative law judge concluded that it is the intent of the legislature to extend workers compensation benefits to volunteers who are injured during the course and scope of their voluntary labor.

In the interpretation of statutes, the legislative will is the all-important or controlling factor. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect. Johnson v. State Tax Commission, 17 U.2d 337, 411 P.2d 831 (1966). In Monson v. Hall, Utah, 584 P.2d 833 (1978), the Utah Supreme Court stated:

One of the cardinal rules of statutory construction requires construction with the objective of bringing consonance to Constitutional and statutory provisions, which will be congruous with expressed intent, and the applicability of the law in general.

p.835.

Statutory provisions dealing with workers compensation benefits for volunteer firemen, volunteers with the Department of Natural Resources and other workers should be regarded as in pari materia and therefore should not be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogeneous system. 73 Am Jur 2d, Statutes, §188.

A general principle of statutory interpretation is that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. In Knowles v. Holley, 82 W. 694, 513 P.2d 18 (1973), the Washington Supreme Court stated:

If a statute specifically designates things or classes of things upon which it operates, the maxim "expressio unius est exclusio alterius" gives rise to an inference that all things or classes of things omitted from the statute were intentionally omitted by the legislature.

pp.22, 23 (footnote).

Likewise, the Arizona Supreme Court in Inspiration Consolidated Copper v. Industrial Commission, 118 Az. 10, 574 P.2d 478 (1977) stated:

When a statute enumerates the subjects upon which it is to operate, it will be construed as excluding from its effect all subjects not specifically mentioned.

p.480.

In other words, it must be presumed that the Utah Legislature considered the impact of the Utah Workers Compensation Act upon volunteers and that they made a conscious decision to lessen that impact upon volunteer firemen and volunteers working with the Department of Natural Resources. However, under the maxim stated above, it must be presumed that the legislature considered other volunteers as well and made a determination not to provide workers compensation benefits for all such volunteers.

#### CONCLUSION

The record is clear that the claimant is a volunteer and not an employee of the Alpine School District. The extension of workers compensation benefits to all volunteers has serious implications for school districts and other non-profit or charitable organizations who rely on volunteers for many services.

We submit that only those volunteers specifically enumerated in the Utah statutes should be entitled to receive workers compensation benefits.

Mr. Olsen has not met the burden of showing that he was ". . .injured. . .by accident arising out of or in the course of his employment. . ." U.C.A. 35-1-45.

The decision of the Industrial Commission erroneously awarding him compensation in this case should be reversed and the claim of Mr. Olsen should be dismissed.

Dated this 18 day of May, 1983.

KIRTON, McCONKIE & BUSHNELL

  
\_\_\_\_\_  
David M. McConkie

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing to the following parties postage prepaid on this 12<sup>th</sup> day of May, 1983.

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