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Melvin Miller, Dba S & E Distributing Company, and Lindsey Warehouse Company, Inc v. The Industrial Commission of Utah, Darlene F. Asay, Widow Of Leroy M. Asay, Deceased, Frank E. Martens, and The State Insurance Fund : Brief of Defendants

IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN M. MILLER, dba S & E DISTRIBUTING COMPANY, and LINDSEY WAREHOUSE COMPANY, INC.,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, DARLENE F. ASAY, widow of LeRoy M. Asay, deceased, FRANK E. MARTENS, and THE STATE INSURANCE FUND,

Defendants.

Case No. 11873

BRIEF OF DEFENDANTS

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STATEMENT OF KIND OF CASE

This was an application filed by Darlene F. Asay with the Industrial Commission of the State of Utah to recover Workmen's Compensation Benefits for the death of her husband, which death occurred during the course of his employment.

DISPOSITION IN INDUSTRIAL COMMISION

At a pre-hearing of the Industrial Commission it was stipulated by the parties and ordered by the hearing examiner that on the 5th day of August, 1966, LeRoy M. Asay, while employed as a truck

driver sustained an injury arising out of or directly in the course of his employment in that he was killed instantly in a truck rollover.

At the time of said death Mr. Asay was 25 years of age, receiving a wage of $325.00 per month working the usual 40 hours per week.

The pre-hearing order of the Commission provided in paragraph 3 as follows:

> "At the time of his death, the deceased was earning a wage sufficient for his dependent to receive the maximum workmen's compensation benefits provided by law."

Darlene F. Asay, the Applicant in this action, was the wife of the deceased LeRoy M. Asay, and as such was the sole surviving dependent of Mr. Asay.

The sole issue to be determined at the hearing was "Who was the employer of the deceased LeRoy M. Asay"?

After the hearing the Industrial Commission held that LeRoy M. Asay was employed by Melvin M. Miller doing business as the S & E Distributing Company and there was no insurance policy in effect covering the deceased LeRoy M. Asay.

RELIEF SOUGHT ON APPEAL

The applicant Darlene F. Asay seeks to sustain the order of the Industrial Commission insofar as it finds the applicant is the sole surviving dependent of the deceased LeRoy M. Asay and entitled to the

maximum benefits provided by the law but seeks to reverse the award of the Industrial Commission insofar as it determines that the State Insurance Fund is not liable to pay said benefits to the applicant.

STATEMENT OF FACTS

On the 5th day of August, 1966, LeRoy M. Asay, while employed as a truck driver by the Lindsey Warehouse Company, sustained an injury arising out of or directly in the course of his employment in that he was killed instantly in a truck rollover.

At the time of said death Mr. Asay was 25 years of age, receiving a wage of $325.00 per month working the usual 40 hours per week. At the time of his death, the deceased was earning a wage sufficient for his dependent to receive the maximum workmen's compensation benefit provided by law.

Darlene F. Asay, the Applicant in this action, was the wife of the deceased LeRoy M. Asay, and as such was the sole surviving dependent of Mr. Asay.

Prior to the 13th day of June, 1966, the deceased was employed by the S&E Distributing Company as a truck driver. The S & E Distributing Company was owned and operated by Mr. Frank E. Martens.

On or about the 13th day of June, 1966, Mr. Miller, owner and on behalf of the Lindsey Warehouse Company entered into negotiations and arrangements to purchase the operation known as the

S & E Distributing Company. On approximately the same date Mr. Miller informed all of the employees of the operation known as S & E Distributing Company that the S & E Distributing Company had been sold and they would now be working for a new owner, (T 271) the Lindsey Warehouse Company.

The Lindsey Warehouse Company commenced to exercise complete dominion and control over the entire operation previously known as the S & E Distributing Company including the collection of the accounts receivable, the selling, returning and distributing of the inventory. (T 272, 273) The Lindsey Warehouse Company commenced to make a common use of the equipment between the two operations, including the use of trucks, pallet jacks, pallets, office equipment, supplies and employees. (T 250, 272)

The S & E Distributing Company and the Lindsey Warehouse Company were separated by a joint wall and were immediately adjacent to each other.

For several years past, the operation now known as the Lindsay Warehouse Company had undergone several changes in its organization and had on at least one prior occasion acquired another business and merged it into the Lindsey Warehouse operation. (T 336, 337)

For many years the operation now known as Lindsey Warehouse has been insured by the State Insurance Fund. (T 188-190) Although the name of the operation was changed several times over the

years the State Insurance Fund did not issue a new policy of insurance, but merely issued new endorsements for the changes. (T 188-190)

On the employer's payroll and premium report form filed with the State Insurance Fund prior to the death of the decendent LeRoy M. Asay near the early part of 1966 the State received written notice that the operation known as the Lindsey Warehouse Company had been incorporated. The State Insurance Fund, however, did not issue an endorsement changing the name of the policy from the proprietorship to the corporation until September 13, 1966, or approximately one month after the death of the decedent. (T 190)

In addition to the operations carried on by the Lindsey Warehouse Company at their main location, they also carried on similar operations at 45 South 3rd West, Salt Lake City, Utah and the employees at this operation were included on the same employer's payroll and premium report form. (T 295, 296)

Prior to the acquisition of the S & E Distributing operation, Mr. Miller consulted with his accountant, Mr. Maxwell. Mr. Maxwell advised Mr. Miller to purchase the S & E Distributing Company and include it in the Lindsey Warehouse Corporation. He advised Mr. Miller to file with each applicable State or Governmental authority one set of reports for the entire operation. He also advised Mr. Miller to maintain, for accounting purposes only, such separate re-

cords as would be necessary to determine the profitability of the S & E Distributing operation. (T 375, 390)

The original payment for the purchase of the S & E Distributing Company was made by a Lindsey Warehouse Corporation check and the accounting entry for said purchase was made on account No. 242, a catch-all account for the Corporation. (Ex. 1, T 339, 390, 244)

Mr. Maxwell, the accountant, was busily engaged doing work for another client, and was also out of town immediately following the acquisition of the S & E Distributing Company and was not able to place the payroll for the S & E Distributing operation in the IBM accounting system of the Lindsey Warehouse Company. (T 429, 430, 431) The employees of the S & E Distributing operation were paid on S & E Distributing checks until the changeover to the IBM accounting system was completed several weeks later.

The employer's payroll and premium report form was prepared by Melvin James Miller, who was the office manager. The report was prepared by taking the information found on the quarterly Federal report form. (T 351, 352) When the employer's payroll and premium report form was prepared for the end of June, 1966, the payroll for Mr. LeRoy M. Asay was not included on the report form since his payroll was not included on the Federal quarterly report

form prepared by the IBM accounting system. (T 351, 355, 356)

Mr. Maxwell, the accountant, testified he did not file an amended tax report with the Federal Government to include the employees of the S & E Distributing Company operation for the last two weeks of June. Since it was such a small portion of the period, he merely included it in the next report filed with the Federal Government. (T 380, 381)

PRE-HEARING ORDER

It was ordered in the pre-hearing order on this matter the "The sole and controlling issue to be resolved at the hearing is the responsible party as the employer of the deceased."

This issue was to be resolved on several alternative theories of proof.

ARGUMENT

POINT I

LEROY M. ASAY, DECEASED, WAS AT THE TIME OF HIS DEATH EMPLOYED BY THE LINDSEY WAREHOUSE COMPANY

On or about the 13th day of June, 1966, Mr. Melvin M. Miller as agent for the Lindsey Warehouse Corporation entered into an agreement with Mr. Frank E. Martens, the sole owner of the S & E Distributing Company, to purchase the S & E Distributing Company. At that time a written memorandum was entered into by both parties setting forth the general terms of the purchase agreement. A check

drawn on the Lindsey Warehouse Company account was then delivered to Frank E. Martens as the first payment or the down payment for the purchase of the S & E Distributing Company.

No evidence was offered by the State Insurance Fund or by any other party to show that Mr. Melvin M. Miller was acting in any capacity other than as agent for the Lindsey Warehouse Company. No evidence was introduced at the hearing by any party to show that Mr. Melvin M. Miller treated or managed the S & E Distributing operation as his own private personal business apart from the corporation.

The accountant, Mr. Maxwell, testified at great length that he discussed the purchase of the S & E Distributing operation with Mr. Miller and advised Mr. Miller to purchase the S & E Distributing Company and include it in the Lindsey Warehouse Corporation operation. He advised Mr. Miller to file with each applicable State or Governmental authority one set of reports for the entire operation. He advised Mr. Miller to maintain, for accounting purposes only, such separate records as would be necessary to determine the profitability of the S & E Distributing operation. (T 375, 390) No evidence or testimony was offered at the hearing which in any way contradicted the testimony offered by Mr. Maxwell.

Mr. Miller testified at the hearing that pursuant to his discussion and instructions from Mr. Maxwell he then as agent for the Lindsey Warehouse Corpor-

ation purchased the S & E Distributing Company operation and made the down payment with a check drawn on the Lindsey Warehouse Corporation. The purchase was credited to a catch-all account of the Lindsey Warehouse Corporation — account number 242. (T 340)

Mr. Miller testified that he attempted to terminate the lease for the building in which the S & E Distributing business was being conducted but was unsuccessful. (T 273, 274) The operation known as the S & E Distributing Company prior to the acquisition by the Lindsey Warehouse Company was adjacent to the Lindsey Warehouse Company and a joint wall separated the two businesses.

Immediately after the acquisition of the S & E Distributing Company by the Lindsey Warehouse Company there was an immediate sharing and joint use of the equipment of the two companies, including the use of trucks, pallet jacks, pallets, office equipment, supplies and employees. (T 250, 272)

Mr. Miller for all practical purposes was the sole owner of the Lindsey Warehouse Company. Mr. Miller was also for all practical purposes the sole manager of the Lindsey Warehouse Company. As such Mr. Miller immediately began to exercise complete control over the employees and the accounts and the equipment of the S & E Distributing Company in behalf of the Lindsey Warehouse Corporation. The only way in which the Lindsey Warehouse Company

could show any outward signs of control over the S & E Distributing operation would be by and through its sole owner and manager — Mr. Miller.

At the time of the hearing of this case no testimony or evidence was offered to show that Mr. Miller acted in his own personal capacity in purchasing the S & E Distributing operation. No evidence or testimony was offered to show that Mr. Miller did not intend to make the S & E Distributing operation part of the Lindsay Warehouse Corporation. No evidence or testimony was offered to show that Mr. Miller did not immediately begin to interchange and exercise joint use of the trucks, pallet jacks, pallets, office equipment, supplies and employees of the two operations.

In short, it could be said that it is uncontroverted by any evidence, even a scintilla of evidence, that all of the acts of Mr. Miller were done in behalf of the Lindsey Warehouse Corporation.

The hearing examiner arbitrarily and capriciously took no cognizance whatsoever of the testimony of Mr. Maxwell, (not an employee) the accountant for the Lindsey Warehouse Company, and a disinterested witness.

The hearing examiner arbitrarily and capriciously completely ignored all of the testimony of Mr. Miller concerning the purchase of the S & E Distributing operation and its inclusion in the Lindsey Warehouse Company.

The hearing examiner then held that Mr. Miller did not purchase the S & E Distributing operation as agent for the Lindsey Warehouse Company but in fact purchased it for his own personal use and at no time contemplated combining it with the Lindsey Warehouse Company until after the death of the deceased, Mr. LeRoy M. Asay and did so only in an attempt to avoid personal liability to the applicant. Such a finding is contrary to the testimony of Mr. Miller corroborated by the testimony of Mr. Maxwell. Such a finding is contrary to all evidence and is arbitrary and capricious since there is no evidence to support said finding.

In the case of *Jones vs. California Packing Corp.*, 244 P2d 640 this Court has ruled upon this type of conduct and stated at page 644:

> "No issue is taken with the thought that the Commission is not obliged to believe evidence if there is anything inherently incredible about it, or any circumstance to warrant failure to accept it. However, where facts are proved by uncontradicted testimony of competent disinterested witnesses and there is nothing inherently unreasonable, nor any circumstance which would tend to raise doubt of its truth, it should be taken as established. Refusal to do so is an arbitrary disregard by the trier of facts.
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> . . . .
>
> "If the Commission could go so far as to refuse to believe such evidence, in the absence of anything of substance to refute it, then it certainly would possess arbitrary powers with

no effective review left available to the litigant . . .

"The law does not invest the Commission with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence, as it appears to have done here."

The attitude of the Industrial Commission is further indicated by its Findings of Fact and Conclusions of Law where at page 3 it provides the following:

"It appears to the Hearing Examiner that a good share of the testimony became "after the fact" testimony. Simply stated, it seems that a serious liability was imminent — let us find a way to move it over where we have insurance."

The attention of this Court is respectfully drawn to the fact that had the hearing examiner not waited from July 29, 1967 (the date of the hearing) until the 29th of May, 1969 to render his decision he would have remembered the persuasive evidence that required a different finding.

POINT II

WHENEVER THERE IS AN ISSUE OVER WHICH THERE MAY BE DOUBT SUCH ISSUE SHOULD BE RESOLVED IN FAVOR OF THE EMPLOYEE.

This Court has stated the rule that every possible inference and every resolution of issues should be drawn in favor of the employee. See *Barber Asphalt Corporation vs. Industrial Commission*, 135 P2d 266 (Utah 1943); *M & K Corporation vs. In-*

dustrial Commission, 189 P2d 132 (Utah 1948); *Leventis vs. Industrial Commission*, 35 P2d 770 (Utah 1934).

The Industrial Commission ignored the guidelines as clearly defined by this Court on so many occasions. The Industrial Commission not only failed to draw every inference or resolve every issue in favor of the employee but also disregarded and ignored uncontradicted, competent, corroborated evidence even given by disinterested witnesses.

This Court has on many occasions laid down the rule that the Workmen's Compensation Act should be liberally construed so as to afford coverage to the employee whenever possible. See *Ogden Iron Works vs. Industrial Commission*, 132 P2d 376 (Utah 1942); *Salt Lake City vs. Industrial Commission*, 140 P2d 644 (Utah 1943); *Jones vs. California Packing Corp.* 244 P2d 640 (Utah 1952); *Park Utah Consol. Mines Co. vs. Industrial Commission*, 36 P2d 979 (Utah 1934).

The Industrial Commission failed to follow these guidelines. The Industrial Commission held that the S & E Distributing operation was carried on as a separate business apart from the Lindsey Warehouse Company. This finding is contrary to all the evidence with no evidence to support the same.

The death of the deceased occurred within six weeks of the purchase of the S & E Distributing operation. Inasmuch as the accountant was out of town

all the formal steps necessary to include the S & E Distributing operation in the Lindsey Warehouse operation from an accounting standpoint had not been perfected. The inclusion of the payroll for various employees in an IBM accounting system is a complicated procedure which can only be handled by a competent accountant skilled in IBM equipment operation. The fact that the payroll for the S & E Distributing operation was not immediately included in the IBM accounting payroll system of the Lindsey Warehouse Corporation does not in and of itself require the conclusion that the S & E Distributing operation was a separate business. As has been previously indicated any question should be construed in favor of the employee.

In 99 C.J.S. Section 64 Workmen's Conpensation at page 278 the following is found:

> "The fact that the worker was or was not carried on the pay roll must be considered, although it is not conclusive. One may be an employee under an act even though not on the employer's pay roll, and even though no pay roll is kept; but the fact of inclusion in the pay roll has been cited as an indication of the relation of employer and employee, and absence therefrom as indicative of an intention not to create the relation."

The reason for the failure to include the S & E Distributing employees on the Lindsey Warehouse payroll as of the date of death of the decedent has been substantially explained by the testimony of a

disinterested competent witness — Mr. Maxwell. Said testimony stands uncontradicted. The Industrial Commission found: "There is no probative evidence to make a finding that Lindsey Warehouse Company, Inc. was the employer." (Finding of Fact, Conclusions of Law and Award, page 3) The hearing examiner further disregarded the testimony and evidence which showed that the down payment for the S & E Distributing Company was made on a Lindsey Warehouse check. (Ex. 1) (T 340)

POINT III

THE DECEASED LEROY M. ASAY WAS COVERED BY WORKMEN'S COMPENSATION INSURANCE ISSUED BY THE STATE INSURANCE FUND.

The State Insurance Fund had a policy of insurance covering the operation of the Lindsey Warehouse Company and had in fact insured the operation now known as the Lindsey Warehouse Company for years (T 188-190) Although the State Insurance Fund had been notified that the Lindsey Warehouse Company had been incorporated the State Insurance Fund did not issue an endorsement changing the name of the insurance policy from Melvin M. Miller, d/b/a Lindsey Warehouse Company until approximately one month after the death of the deceased (T 190) Technically, the State Insurance Fund was insuring all the employees of Melvin M. Miller in and about the Lindsey Warehouse Company operation.

The State Insurance Fund issued a policy of in-

surance to Melvin M. Miller and subsequently the Lindsey Warehouse Company, which policy by its terms incorporated into it the statutes of the State of Utah regarding Workmen's Compensation. The policy by incorporation of the statutes assumed the entire liability of Mr. Melvin M. Miller to his employees as provided by the statutes of the State of Utah. New employees were automatically covered (both by practice and procedure) on the date of their employment without any notification necessary to the State Insurance Fund.

The policy of insurance upon Mr. Melvin M. Miller covered his entire liability arising out of the Workmen's Compensation Act. Several Courts have spoken on this issue. See *West Chandler Farms Co. vs. Industrial Commission*, 173 P2d 84 (Ariz. 1946); 100 C.J.S. Workmen's Compensation Section 364 at page 56.

This Court has in effect made the same ruling where in the case of *Empey vs. Industrial Commission of Utah*, 63 P2d 630 (Utah 1937) the Court stated that the "employer is either wholly within or altogether outside its operation." In the Utah Code Annotated Section 35-3-11 it provides that in the event premiums are paid by an employeer on the "estimated expenditure of wages" method, at the end of the "period" if there is a deficiency it shall be forthwith paid to the State Insurance Fund and if there is an excess it is to be refunded to the employer. It is quite clear that the payment of the premium for the insur-

ance coverage by the State Insurance Fund is done on an estimated basis at the beginning of the period with the final adjustment being made at the end of the period.

The said statute contemplates the automatic insurance coverage for any new employees of any employer already covered by the State Insurance Fund. No forms are sent to the State Insurance Fund. They are not required by the State Insurance Fund or the statute. No endorsements are necessary for the insurance policy for the inclusion of new employees. There is merely an increase in the premium due based upon the payroll expenditure, which increase is paid at the end of the payroll period.

The fact that the estimated premium may or may not have reflected the increased number of employees brought in from the S & E Distributing operation to the Lindsey Warehouse Company can make no difference. The State Insurance Fund was entitled to the money for the premiums and if they were not collected at the beginning of the period they were due at the end of the period. The employer could not avoid liability for payment of the premiums. The remedy available to the State Insurance Fund for the failure of the employer to pay the premiums — in the event the employer failed to pay them was a civil action against the employed as provided for in Utah Code Ann. section 35-3-17 which allows interest at the rate of 12% per annum.

The statute does not provide that an employer's

liability insurance for workmen's compensation is forfeited upon his failure to pay the premiums. In fact the statute sets forth the opposite position. It allows only a cause of action against the employer for failure to pay the premium due. Even if the employer had willfully failed to pay the State Insurance Fund this would not void the policy of insurance but would result in a cause of action arising in the State Insurance Fund against the employer.

In the case of *West Chandler Farms Co. vs. Industrial Commission*, 173 P2d 84 (Ariz. 1946) the Court at page 90 stated:

> "Mere failure to include wages of employees who are covered by the policy, whether inadvertantly or under the belief that such employees are independent contractors, will not void the policy between the insurer and the assured. It is not always possible to determine the total number of employees thus new employees upon which wages no premiums have been paid are protected by these policies."

This rule has been followed and has been stated by other Courts. See *Schneider vs. Salvation Army*, 14 N.W. 2d 467 (Minn. 1944).

This Court in the case of *Empey vs. Industrial Commission of Utah*, 63 P2d 630 (Utah 1937) restating a rule set forth in a Massachusetts case declared the following:

> "If an employer becomes a subscriber he becomes a subscriber for all purposes as to all branches of one business with respect to all

those in his service under any contract of hire. All the terms of the act are framed upon the basis that the employer is either wholly within or altogether outside its operation. There is no suggestion or phrase warranting the inference that there can be a divided or partial insurance.

"The practical administration of the act renders it highly desirable that a single rule of liability should apply throughout any single business. Otherwise difficult and troublesome questions often might arise as to liability or non-liability dependent upon classifications of employees and scope of their duties. Litigation as to the line of demarcation between those protected by the act and those not entitled to its benefits would be almost inevitable. Instead of being simple, plain and prompt in its operation, such divisions of insurance would promote complications, doubts and delays."

Although the Empey case is not identical to the case at bar the rule it states is sufficiently broad to more than adequately cover the present facts of this case.

In the case of *Leventis vs. Industrial Commission*, 35 P2d 770 (Utah 1934) this Court held that where both businesses were operated under the same roof and in or about the same establishment and that each of the partners owned an interest in each of the businesses that both businesses were liable for compensation where an employee of one of the businesses was injured during the course of his employment.

CONCLUSION

Mr. LeRoy M. Asay was employed by the Lindsey Warehouse Company at the time of his death. All the evidence shows Mr. Miller acted in behalf of the Lindsey Warehouse Company in hiring Mr. Asay and directing his activities. The Industrial Commission acted in an arbitrary and capricious manner when it failed to draw the logical conclusion that Mr. Asay was employed by the Lindsey Warehouse Company. The State Insurance Fund had issued a policy of insurance which at the date of the death of Mr. Asay was in the name of Melvin M. Miller, d/b/a Lindsey Warehouse Company and fully covered Mr. Miller and the Lindsey Warehouse Company as the employer of Mr. Asay.

This Court is respectfully requested to sustain the award of the Industrial Commission insofar as it holds that Mrs. Asay was the sole dependent of Mr. Asay, deceased, and as such was entitled to the maximum benefits as provided by law but this Court is respectfully requested to reverse the award of the Industrial Commission insofar as it found that the State Insurance Fund was not liable to pay said award to the applicant.

Respectfully submitted,

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