7-16-2008

Bradford v. Roche Moving & Storage, Inc. Appellant's Reply Brief Dckt. 34854

IN THE SUPREME COURT OF THE STATE OF IDAHO

BARRY BRADFORD, Plaintiff, Appellant, vs. ROCHE MOVING & STORAGE, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORTATION, Surety, and FRONTIER MOVING & STORAGE, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants/Respondents.	)	Supreme Court No. 34854 APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

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APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO
Chairman James F. Kile, Presiding

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TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES

CLAIMANT/APPELLANT'S REPLY

In it's Opposition to Claimant/Appellant's Opening Brief, Defendant/Respondent Frontier Moving & Storage/State Insurance Fund ("Frontier") argues that the Commission's findings were based on "substantial and competent evidence," and therefore Claimant's appeal must be denied. [Frontier's Opposition Brief, p. 9] Frontier further argues that the argument involving the "emergency doctrine" is a "new issue" Claimant should not be able to raise on appeal, and there was no "emergency" even if the emergency doctrine is considered.

Defendant/Respondent Roche Moving & Storage/Liberty Northwest Insurance Corporation ("Roche"), in it's Opposition Brief, argues in essence that Claimant is inappropriately asking the Court to "reweigh and reapply the evidence" [Roche's Opposition Brief, p. 12] Further, Roche argues that Claimant was properly deemed a "volunteer" by the Referee when this accident occurred. Roche also makes essentially the same arguments regarding emergency as did Frontier.

Both Frontier and Roche argue they are entitled to attorney's fees in addition to costs on appeal.

REPLY ARGUMENT:

The issue at the hearing held on May 3 and 4, 2007, was clearly defined as follows: "Who was claimant's employer or was claimant an independent contractor on August 9, 2007?" Tr. p. 7, L. 9 –10.

Neither Frontier nor Roche disputes that the above states the issue at the hearing of this matter. No objections were made at the hearing when the above issue was stated.

The material facts in this accident are not in dispute. Whether Claimant had to climb over a forklift or not to get to the ladder is not material. [Frontier's Opposition, p. 23] One important material fact not in dispute is that Claimant was not an independent contractor when this accident happened. It is further not disputed that a "lumper" and "day laborer" are both considered employees.

The issue was intentionally framed as above stated because w*ho* Claimant's employer was at the time of this accident was a significant question. Roche had recently been taken over by Frontier, but the sale had not been entirely completed at the time of this accident. Even though Claimant was clearly *somebody's* employee, it was not clear who that was when he was injured.

Claimant contends that the Commission made an error of application of the law to the clear facts of this case and the Industrial Commission's legal conclusions are freely reviewable by this Court. *Niehart v. Universal Jt. Auto Parts, Inc.,* 141 Idaho 801, 803, 118 P.3d 133, 135 (2005)

Upon determining that Claimant was not an independent contractor, the Referee should have then turned to the issue of *who* was Claimant's employer, instead of going to volunteer status, which was not an issue at hearing.

The Commission, by bringing up the new issue of whether or not Claimant was a volunteer when he was injured, opened the door to the proper application of the rule of law to the facts of this case as they relate to implied employment - including proper application of the emergency doctrine. If it is error to bring up the emergency doctrine as a new issue at this time, as Defendants argue, it was first error for the Commission to bring up the "volunteer" issue.

Claimant contends that application of the emergency doctrine is neither a new issue nor an attempt to change the underlying facts. It is an application of the law to the facts, which legal doctrine the Commission erroneously failed to either consider or apply in coming to it's decision.

With respect to what constitutes an emergency, clearly the weight of authority provides that protection of an employer's property can be considered an emergency. As argued previously, regarding emergency services, it is worth repeating that Larsen, on Workerman's Compensation Law, the leading authority on work comp law, states that:

> "It is well established that a person who is asked for help in an emergency which threatens the employer's interest becomes an employee under an implied contract of hire. The most familiar example is that of the farmer or bystander who is called upon by an employed trucker to help get the truck out of the mire in which it is stuck." *1 Larsen, Workmen's Compensation Law*, §65[3], p. 65-15.

As previously argued, the undisputed facts of this case go much further toward employment than a mere bystander who is asked to help push out a stuck truck. There is no question that the stuck garage door in this case stopped business, denying ingress and egress into and out of the storage facility – essentially shutting down the business for as long as the door was stuck. According to Chad Rose, Frontier's General Manager at the time, it was important to the business that day to get the door open because they had a shipment going out, ready to be loaded onto a truck. Tr. p. 150. Chad Rose testified that one of the reasons *he allowed* Claimant to work on the door and try to un-jam it was "because maybe he [Claimant] knew something that you [Chad Rose] or Scott didn't know." Tr. p. 152. Clearly the employer's interest was threatened by the stuck door.

With respect to Defendants' demand for attorney's fees, Defendants' are also in error. I.A.R. 41 addresses attorney's fees on appeal and there is no authority for the award of attorney's fees against a worker's compensation claimant who unsuccessfully appeals to the Supreme Court of Idaho. *Swanson v. Kraft, Inc.*, 116 Idaho 315, 775 P.2d 629 (1989)

CONCLUSION

At the time of this accident, Claimant respectfully contends that the undisputed facts show he was either a "lumper" or "day laborer" and was neither an independent contractor nor a volunteer.

Defendant's arguments that Claimant should be precluded from arguing the "new issue" of the emergency doctrine is a double-edged sword that cuts both ways. Based on their arguments, it was first error for the Commission to consider the new issue of whether or not Claimant was a "volunteer," since that issue was not included in the issues to be addressed at the hearing.

Defendant's arguments that they are entitled to attorney's fees are also without foundation in either fact or law.

Claimant respectfully asks the Court for relief, and a finding that the Claimant was an employee when he was injured on August 9, 2006, and is entitled to both medical and income benefits.

Dated: 7/15/08

PAUL T. CURTIS
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Barry Bradford

Certificate of Service

I hereby certify that on the 15 day of July, 2008, two copies of the foregoing **APPELLANT'S REPLY BRIEF** were served upon the following attorneys of record by the method indicated:

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