11-30-1949

Industrial Indemnity Company v. Industrial Accident commission

Roger J. Traynor

128 Cal.App. 104

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8620.

District Court of Appeal, First District, Division 2, California.

Dec. 9, 1932.

Master and servant ⇐405(2).

Evidence that newspaper seller was paid weekly wage for supervising "news hustlers" supported Industrial Accident Commission's finding that she was publisher's employee.

Certiorari to Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act by Mattie Toy, employee, opposed by the San Francisco Chronicle, employer. To review an order of the Industrial Accident Commission awarding compensation for injuries sustained by claimant, the Associated Indemnity Corporation, insurance carrier, brings certiorari.

Award affirmed.

John J. Taheny and R. O. Purvis, both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

SPENCE, J.

Petitioner seeks annulment of the award of the respondent commission granting compensation to Mrs. Mattie Toy for injuries sustained by her on July 6, 1931.

The petitioner is the insurance carrier of the San Francisco Chronicle, a daily newspaper. Contending that Mrs. Toy was merely a news lady engaged in selling the papers of the publishing company, petitioner cites and relies upon New York Indemnity Company v. Industrial Accident Commission, 213 Cal. 43, 1 P.(2d) 12, and Hartford Accident & Indemnity Company v. Industrial Accident Commission (Cal. App.) 10 P.(2d) 1035. In our opinion, these authorities are not determinative of the present controversy. In addition to retaining the difference between the amount which she received from the purchasing public and the amount which she paid to the publishing company for the papers, Mrs. Toy was paid the sum of $3 per week by the publishing company. There is some conflict in the testimony regarding the nature and purpose of these weekly payments, but the testimony offered by the applicant tended to show that the money was paid as wages for the supervision of ten to thirteen "news hustlers." This testimony clearly distinguishes this case from the authorities relied upon, and we find no merit in petitioner's contention that there was no evidence to support the finding to the effect that the applicant was an employee of the publishing company.

The award is affirmed.

I concur: STURTEVANT, J.

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128 Cal.App. 133

DAHL v. SPOTTS et al.

Civ. 633.

District Court of Appeal, Fourth District, California.

Dec. 9, 1932.

1. Automobiles ⇐244(20).

Evidence that cartons, weighing 30 pounds each, with 11 year old boy, were precipitated from truck making right turn, supported jury's implied finding that driver was guilty of gross negligence.

2. Automobiles ⇐245(24).

Whether negligence of automobile driver is gross is question of fact for jury.

3. Evidence ⇐589.

Physical facts surrounding automobile accident may be relied on to support judgment and contradict direct testimony of defendant.

4. Negligence ⇐136(25).

Whether negligence of defendant proximately caused injury is question of fact for jury.

5. Automobiles ⇐245(36).

Whether defendant was owner of truck driven by another at time of accident *held* for jury (Civ. Code, § 1714¼).

6. Evidence ⇐75.

Where defendant refuses to produce evidence which would overthrow case made against him if not founded on fact, presumption arises that evidence, if produced, would operate to defendant's prejudice (Code Civ. Proc. § 2061, subd. 6).

7. Appeal and error ⇐105.

Order denying motion for nonsuit *held* not appealable (Code Civ. Proc. § 963).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Milford W. Dahl, by Edward W. Dahl, guardian ad litem, against Charles Spotts and another. From a judgment for de-