

1949

Johanson Brothers Builders, Carl F. Johanson, Contractor v. Otto A. Wiesley, Wesley A. King and Gail Martin, as Board of Review of the Industrial Commission of Utah : Brief of Plaintiffs

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHANSON BROTHERS BUILDERS,
CARL F. JOHANSON, CONTRAC-
TOR,

Plaintiffs,

vs.

OTTO A. WIESLEY, WESLEY A.
KING and GAIL MARTIN, as
BOARD OF REVIEW of the INDUS-
TRIAL COMMISSION OF THE
STATE OF UTAH,

Defendants.

FILED

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CLERK, SUPREME COURT, UTAH

Plaintiffs
BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

STATEMENT

This is an appeal from the Board of Review of the Industrial Commission upholding a former decision of the Appeals Tribunal in which it was found that Carl F. Johanson was an employer and as such liable for contribution on the wages of his associates.

NOTIFICATION OF DEFICIENCY

On February 23, 1949, the Chief of the Division of Insurance mailed to Carl F. Johanson a Notice that a deficiency had been determined against him as employer covering the four quarters of 1947 and the four quarters of 1948 for wages paid in the sum of \$16,807.49 against which there was due as Contribution the sum of \$425.48, interest in the sum of \$14.86 and penalty in the sum of \$107.02. Said Carl F. Johanson on the 3rd day of March filed his objection to such determination and requested a hearing. In pursuance a hearing was had before the Appeals Tribunal of the Industrial Commission after which the said Tribunal made its Findings and rendered its decision.

FINDINGS OF FACT

1. Finding number 1 was to the effect that Carl F. Johanson had been a bricklayer, then a farmer and again a bricklayer for various individuals and was employed on an hourly basis.

2. That Carl F. Johanson had purchased some equipment which eventually reached the sum of \$500.00. That he and Robert Clayton went to work on some bricklaying, Johanson doing the bricklaying and Clayton serving as a mason tender. That in the beginning they divided all receipts on the basis of 3 to 2, Johanson taking the larger portion.

3. Finding 3 is to the effect that Johanson secured more contracts and it became necessary to take in more men. Most of the men were inexperienced in bricklaying

in the beginning and had to be trained and in the beginning did not receive as high a division of the proceeds as the more experienced men. The unit payment basis was discussed among all the workers. These units were changed from time to time as the new men became more experienced.

4. Finding 4 is to the effect that it was understood by all the workers that Carl F. Johanson would get 10% of the net proceeds for furnishing equipment and keeping it in condition. All funds were kept in Johanson's checking account.

5. That in October, 1948, Carl F. Johanson, Robert Clayton, Einar Johanson and Willard Johanson entered into an oral partnership agreement which was reduced to writing in February, 1949.

6. That after the formation of the partnership written Joint Operation Agreement was signed by each worker. The relationship between the workers was the same before as after the signing of the written agreements.

CONCLUSIONS OF LAW

The Appeals Tribunal, therefore, finds:

1. That during 1947 and until October, 1948, the individuals working with Mr. Carl F. Johanson were "in employment" with him and the amounts received by them or due them for their work constitute "wages."

2. That subsequent to October 1, 1948, the individ-

uals working with the four partners were "in employment" with the partnership and the amounts received by them or due them for their work constitute "wages."

DECISION

DECISION: That prior to October 1, 1949, Mr. Carl F. Johanson was liable for payment of unemployment contributions on the wages of his workers; and subsequent to October 1, 1949, the partnership was liable for the payment of unemployment contributions on the wages of its workers, the amounts to be determined in each instance by impartial audit of the employer's amounts by the Department as provided by law. No penalty is attached.

BOARD OF REVIEW

The matter was then appealed to the Board of Review which rendered its decision on August 17, 1949, upholding the Decision of the Appeals Tribunal.

EVIDENCE

The evidence showed that Johanson Brothers Builders, as presently constituted consists of Carl F. Johanson, Robert Clayton, Willard Johanson, Einar Johanson and Warren Curley. Record P. 15. The organization or association was begun in the early part of 1947 by Carl F. Johanson, a bricklayer, and Robert Clayton, a mason tender, and was known from the beginning as "Johanson Brothers Builders," because they figured they would

work as a brotherhood and that anyone who joined them would share in the profits and work as a co-operative or a brotherhood. Record P. 19-20. "We got a contractor's license under name of "Johanson Brothers Builders." Record P. 20.

Carl F. Johanson borrowed \$250.00 from his brother for which he bought some equipment. Record p. 20. At the time the contractor's license was secured Carl F. Johanson asked someone in the Industrial Commission what they would have to do about Workman's Compensation, Insurance and Social Security Taxes and was told that the Commission had no jurisdiction over them because "We'll have to call you a bastard company." Record P. 21.

After they got the contractor's license Carl F. Johanson and Robert Clayton worked together laying brick in a house. Carl F. laying brick and Clayton tending. They worked long hours and after taking out 10% of the receipts for payment on equipment divided the balance 3 to Carl F. Johanson and 2 to Clayton because of Johanson's longer experience and greater efficiency. A little later they took the same division as Clayton began laying brick and became more efficient, Record p. 23.

Later, still during 1947, they took in others on a similar basis, which was dividing the receipts according to points depending on the kind of work done and the efficiency of each of the individual workers. Record p. 24. They about equaled union wages. Record p. 25.

They confined their work mostly to masonry but did

some carpenter work. Record p. 26. Their arrangement was oral until this year when they had same reduced to writing because misunderstanding had arisen with verbal agreements. Record p. 26.

Partnership Agreement introduced as Exhibit "A" & Joint Operation Agreement, Exhibit "B" both provided all income shall be prorated according to efficiency of individual members from time to time by majority vote. Record p. 27. It was the same from the beginning except that then it was verbal. Record p. 31.

If they didn't get paid for a job all took the risk. Record p. 25. The five men now are dividing everything in equal shares. Record p. 27. Since last fall all the equipment belongs to the association. Record p. 32.

The present association is composed of three brothers and two outsiders. Record p. 38. The 10% Carl F. took for equipment in the beginning barely did defray the expenses. Record p. 31. After September or October, 1948, all received the same in everything. Record p. 32.

The license has always been taken in the name of "Johanson Brothers Builders". Record p. 32. Membership changed from time to time. Record p. 34. If a man quit before he got all his money he was given a statement of what he had coming when it was collected and a list of the jobs. Record p. 35.

They filed Partnership Income Tax Returns with the State and the Federal on a partnership blank. Record p. 36. They figured they had a joint agreement all the time. Record p. 37.

They all agreed by voice vote how many hours they should work on each job. Record p. 37. If a man took the afternoon off his share would not be reduced if he had a good reason. Record p. 37-38.

When Thayer Christensen and Talmadge Robinson came to work it was after Einar Johanson had explained their arrangements in detail. Record p. 42-43. They got their proportionate share of the jobs of the association whether they worked on them personally or not. Record p. 43.

Most of those who worked with the association became full fledged brick layers. Record p. 42.

The company money was kept in Carl F. Johanson's personal bank account because they worked so close that often they would put the money in the bank one day and draw it out the next day. If they kept another bank account with less than \$200.00 they would be penalized. Record p. 39. Carl F. Johanson's money was kept separate from the company by a stamp on the checks written for the company. Record p. 40.

ASSIGNMENT OF ERRORS

1. The Appeals Tribunal erred in its Conclusion of Law Number 1.
2. The Appeals Tribunal erred in its Conclusion of Law Number 2.
3. The Appeals Tribunal erred in entering its Decision finding Carl F. Johanson liable for payment or

Unemployment Compensation Contributions prior to Oct. 1, 1948, and in finding that the partnership was liable for such Contributions subsequent to October 1, 1948.

4. The Review Board erred in following and sustaining the Decision of the Appeals Tribunal.

5. Neither the Conclusions of Law or the Decision is supported by the evidence.

ARGUMENT

There is only one question involved in this case, namely: Is Johanson Brothers Builders a partnership or joint adventure or is it such other organization as will subject one of its members, Carl F. Johanson, to liability for Employment Compensation Contributions under the Laws of the State of Utah? In as much as there is only the one question involved all assignments of error will be discussed as a whole.

We most emphatically assert that "Johanson Brothers Builders", including all who have joined them since their beginning in the early part of the year 1947, are either partners or joint venturers and as such are not liable to Employment Compensation Contributions. It doesn't matter what you call them. You may call their organization a straight partnership or a joint venture and the result is the same.

Our own Statute at Section 69-1-3 Utah Code Annotated defines a partnership thus:

"69-1-3. Partnership Defined.

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

But any association formed under any other statute of this state, or any statute adopted by authority other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter; but this chapter shall apply to limited partnerships except in so far as the statute relating to such partnerships are inconsistent herewith."

Inasmuch as our Workmens Compensation Act is closely related to the Federal Social Security Act it might well be considered that we should adopt some of the rules of its construction. The Internal Revenue Code at Section 3797 defines a partnership as follows:

"Partnership and Partner—The term "Partnership" includes a syndicate, group, pool, joint venture, or other organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or corporation; and the term "Partner" includes a member in such a syndicate, group, pool, joint venture, or organization."

And Research Institute of America Vol. 2, Section N-506 says:

"For tax purposes, a partner is a member of any organization which is treated as a partnership. Thus a partner for tax purposes is broader than its generally accepted meaning. A member of a syndicate, pool, group or joint venture is a partner."

33 C. J. page 841, Section 1, defines a joint adventure thus:

“(No. 1) A joint adventure has been aptly defined as ‘a special combination of two or more persons, where in some specific venture a profit is sought without any actual partnership or corporate designation’.”

All of the above definitions are entirely in accord with the decided Utah cases. In the case of Bently v. Bossard, 33 U. 396, 95 Pac. 736, this court said:

“The requisites of partnership are that parties must have joined to carry on trade or adventure for their common benefit each contributing property or services and having a community interest in profits.”

In *Rockefeller v. Industrial Commission* 58 U. 124, 194 Pac. 1038 this court ruled:

“Partners are not employees within the purview of compensation act.”

The facts, in short, in the Rockefeller case were: Rockefeller and another Trobough ran a taxi service in Ogden called “84 Taxi Service”. Rockefeller managed the business and answered calls. Trobough, though not there much of the time, and who did not devote a considerable amount of his time to the business, also answered calls on occasions. These two partners had one employee who serviced the automobiles and kept them in repair, a third person, a brother of the car service men, also answered calls when they were not otherwise

taken by Rockefeller, Trobough or the service man. He was paid 25% of the fee for each call he answered. That was the set up when, Wilson, the deceased, applied for a job. Rockefeller told him he had no job for him. To which Wilson queried could he take a car to answer calls on the basis of 25% of the fee received when there were calls available. That was the arrangement finally made. On one of his trips he met with an accident and died from the injuries received in such accident. His widow applied to the Industrial Commission for compensation for the death of her husband against Rockefeller and compensation was granted. From that award Rockefeller appealed to this court and the award was set aside on the grounds that Wilson and Rockefeller were engaged in a joint enterprise and were in effect partners.

We believe the facts in the instant case are much stronger in support of a partnership or joint venture than they were in the Rockefeller case. In short, the pertinent facts in this case are: Carl F. Johanson and Robert Clayton started out early in the year 1947 to do brick laying under the style of "Johanson Brothers Builders". Johanson laid the brick and Clayton was the tender. They figured in taking more workers in with them as they secured more jobs and they called the group "Johanson Brothers Builders" not because of blood relationship (though later three brothers of Carl joined the group) but because they intended to work as a "brotherhood". At the beginning Carl F. Johanson got a larger division of the receipts than Clayton, but

soon Clayton became an efficient bricklayer and then received the same as Johanson. Later they took in other workers under exactly the same arrangements and their respective shares of the receipts were divided according to experience and efficiency by majority vote of the whole group. Most of the men thus engaged became full fledged masons or bricklayers. Some left for other employment after they became proficient masons because they thought they could make more money or work shorter hours. At present all four, Carl F. Johanson, Robert Clayton, Willard Clayton and Einar Johanson are full fledged masons and only Warren Curley, at the time of the hearing was not a competent mason. (He probably is by this time). All five now in the group or association divide all the proceeds in exactly the same proportions and all share in the expense of the equipment and any losses that occur from lack of collections or otherwise. From the beginning all members have shared in their respective proportions in the losses.

At the start Carl F. Johanson got 10% of the net for equipment costs, expenses and taking care of the records.

We see nothing in these facts to make Carl F. Johanson an employer any more than it would Robert Clayton. They both started at the inception of the association. The fact that Johanson, because of his agreed superior training and experience, received more of the proceeds than did Clayton does not alter the case. It is not at all unusual for one partner to receive more of the benefits of a partnership than another, nor is it an indi-

cation that there was not a partnership because one might have had more to do with the management of affairs than another. In the last case above mentioned, Rockefeller vs. Industrial Commission, it was plain that Rockefeller had the complete management of the business and that he spent much more time with the affairs of the partnership than did Trobough, yet they were partners. Also notwithstanding Rockefeller and Trobough owned all the equipment used in the taxi service and Rockefeller had complete management of the affairs this court considered Wilson a partner, or at least a joint adventurer with Rockefeller and Trobough.

In this case the evidence does not show, notwithstanding the decision of the Appeal Tribunal, that Carl F. Johanson had the management of "Johanson Brothers Builders." On the contrary the evidence shows that all matters of importance were decided by the majority voice vote of all the members. True, Carl F. Johanson, especially in the beginning, had more of the direction of how the work should be done than others but can defendant point out any partnership in the entire community where some member did not have more influence in some phase of the business than another. Surely, in every organization there must be someone to take the initiative. Just because Carl F. Johanson conceived an idea where he might work in harmony with others to their mutual advantage can it properly or justly be said that he should remain an insurer of their welfare. It would be a great injustice to Carl F. Johanson, after he sacrificed so much training others and making them efficient, at his own

expense, and for their mutual good to make him now an insurer for all the others who shared equally with him in proportion to their efficiency. They have received their portion and no deductions were made or considered. Carl F. Johanson received no personal advantage over any of the others. He had no greater vote than the others. The fact that he, for a period, furnished the equipment for which he was paid certainly does not make **him an employer**. Many a partner has furnished all the equipment and yet had a legally binding, bona fide partnership with others who furnished no equipment.

We submit that the "Johanson Brothers Builders," including all who have ever belonged, is and has been a partnership, or at least a joint venture, sufficient, both in spirit and in fact, to take them out of the jurisdiction and control of The Industrial Commission as far as the division of proceeds from their labors is concerned and that Carl F. Johanson is no more the employer than is Robert Clayton or Warren Curley.

The Decision of the Appeals Tribunal and of the Review Board should be reversed.

Respectfully submitted,

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