

1950

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 Respondents

Utah Supreme Court

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Attorneys for Respondents; Clinton D. Vernon; Fred F. Dremann;

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In the Supreme Court of the State of Utah

JOHANSON BROTHERS BUILD-
ERS, CARL F. JOHANSON, CON-
TRACTOR,

Appellants,

vs.

BOARD OF REVIEW, INDUSTRIAL
COMMISSION OF UTAH, DE-
PARTMENT OF EMPLOYMENT
SECURITY,

Respondents.

Case No. 7393

RESPONDENTS' BRIEF

FILED

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Attorneys for Respondents:

CLINTON D. VERNON
Attorney General

Clerk, Supreme Court, Utah

FRED F. DREMANN, *Special*
Assistant Attorney General

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STATEMENT OF POINTS

The respondents contend that all of the operations of the Johanson Brothers builders prior to October, 1948, were conducted by Carl W. Johanson, as the employer, and that the individuals in question were performing services for him for wages 6

POINTS OF ARGUMENT

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RESPONDENTS' BRIEF

STATEMENT OF FACTS

On February 23, 1949, a representative in the Utah Department of Employment Security of the Industrial Commission of Utah sent a written notice to Carl F. Johanson, Contractor, Salt Lake City, Utah, notifying him that it had been determined that unemployment compensation contributions, interest and penalty were due on unreported wages for the period commencing January 1, 1947, and ending December 31, 1948, in the amounts as follows:

Wages	\$16,807.49
Contributions thereon	425.48
Interest	14.86
Penalty	107.02

On March 3, 1949, a written appeal from this decision was filed by the appellant through his attorney. On May 16, 1949, the Appeal Referee notified the parties of the time and place of hearing. After a postponement, the matter was heard by the Referee on May 31, 1949. The Referee upheld the decision of the Commission representative, and on June 16, 1949, Carl F. Johanson appealed from the Referee's decision. On the 17th day of August, 1949, the Board of Review of the Industrial Commission of Utah, Department of Employment Security, upheld the decision of the representative and the Referee. Thereafter, on the 29th day of August, 1949, the appellant filed a petition for review in the Supreme Court.

Carl F. Johanson, in 1947, filed an application and was granted a contractor's license to do business as "Johanson Brothers Builders." He purchased some equipment and proceeded to obtain contracts to do brick work. In the beginning one Robert Clayton performed the services as mason tender for which it was agreed that Clayton would be paid a percentage of the net income after Johanson had first received 10 percent for the use of his equipment. The percentage of the net was established by Johanson on a 3-2 basis with Johanson taking the major share.

As Johanson secured more contracts, it was necessary to take in more workmen. Most of the men so engaged were inexperienced in laying bricks, and it was necessary for them

to be trained; and, consequently, they were given a lesser share than those who were trained. The units which were assigned to each man were changed at times after discussion among the group relative to the individual proficiency of such men.

None of the workmen were required to invest money in any of the projects. Carl F. Johanson obtained the contracts and the materials, and prior to any division of profits, Johanson paid the material costs and paid himself 10 percent for use of his equipment. All funds which were obtained as a result of the contracts were deposited in Carl F. Johanson's personal account and he disbursed payments by means of his individual check. In addition to the contracting, Johanson owned a farm, and income and expenditures regarding the farm were made using this same personal bank account (Tr. 33-34).

This working arrangement continued until October, 1948, when a partnership was formed between Carl F. Johanson, Robert Clayton, Inar Johanson, and Willard Johanson. The respondent agrees that as of that time the employing unit was a partnership. With the formation of the partnership these other three individuals acquired for the first time an interest in the assets of the enterprise (Tr. 25).

During the time prior to October, 1948, there was a considerable turnover of personnel involved. In 1948, prior to October, there were 17 workmen involved (Tr. 28). Prior to the formation of the partnership, Carl F. Johanson, as an individual, was responsible for all of the contracting and the payment of material costs, etc. (Tr. 25).

STATEMENT OF POINTS

The respondents contend that all of the operations of the Johanson Brothers Builders prior to October, 1948, were conducted by Carl F. Johanson, as the employer, and that the individuals in question were performing services for him for wages.

ARGUMENT

The Commission representative, the Referee, and Board of Review are correct in interpreting the facts in this matter whereby they determined that no partnership existed prior to October, 1948, and that, therefore, the services which were being performed were being performed for Carl F. Johanson as the employer.

Section 42-2a-19(i), Utah Code Annotated 1943, as amended, defines employer as:

“(i) ‘Employer’ means:

“(1) Any employing unit which paid wages during a calendar quarter for employment amounting to \$140 or more and any employing unit subject to the Federal Unemployment Tax Act.”

Section 42-2a-19(j)(1), Utah Code Annotated 1943, as amended, defines employment as:

“(1) ‘Employment’ means any service performed prior to January 1, 1941, which was employment as defined in the Utah Unemployment Compensation Law prior to the effective date of this act, and subject to the other provisions of this subsection, service performed after December 31, 1940, including service in inter-

state commerce, and service as an officer of a corporation performed for wages or under any contract of hire written or oral, express or implied.”

We contend that Carl F. Johanson was the employer and that all of the other individuals who were performing services were performing such services in employment and not as partners of Carl F. Johanson and that the respective “units” of the profits were wages within the meaning of the Utah Employment Security Act.

Section 42-2a-19(p), Utah Code Annotated 1943, as amended, defines wages as:

“(p) ‘Wages’ means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. Gratuities customarily received by an individual in the course of his employment from persons other than his employing unit shall be treated as wages received from his employing unit. The reasonable cash value of remuneration in any medium other than cash and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the Commission; provided, that the term ‘wages’ shall not include:”

Section 42-2a-10(i), Utah Code Annotated 1943, as amended, provides, in setting up the procedure for appeal to the Supreme Court:

“ . . . In any judicial proceedings under this section, the findings of the Commission and the Board of Review as to the facts as supported by evidence shall be conclusive, and the jurisdiction of said court shall be confined to questions of law . . . ”

The representative of the Commission properly found that the facts were inconsistent with the existence of a partnership.

Section 69-1-3, Utah Code Annotated 1943, defines a partnership as:

" . . . (a) An association of two or more persons to carry on as co-owners of a business for profit."

Section 69-1-4, Utah Code Annotated 1943, in setting forth rules for determining the existence of a partnership, provides as follows:

" . . . (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment: . . .

"(b) *As wages of an employee or rent to a landlord . . .*" (italics ours).

We think that the relationship is properly described by the testimony of Mr. Thayer Christensen who testified (Tr. 6) that he was fifteen years of age at the time he performed services for Carl F. Johanson and that after working for Johanson from June until August, he was not told until it became time to "settle up" that a so-called partnership existed and that he was deemed to own 1-8 of the business enterprise. He stated (Tr. 6), in referring to the conversation that took place between Johanson and himself:

"We were all partners in business, so he tried to explain to us—but how could we be partners? I don't know because we were just working for him.."

Christensen later testified (Tr. 7):

"Question: Did you ever have any arguments with Mr. Johanson about the rate of pay?

"Answer: Not arguments. Towards the last part we told him that we would like to settle up if he would go around and collect from the guys that owed him money so we could be paid when we got off, and he said he would, and then after that we quit working for him. We had to keep going back and going back and finally we had to send a complaint into the Commission (apparently he means Industrial Commission), and I guess they sent a man out to see him and then he sent us \$50.00 is all."

When Christensen, in his testimony, uses the term "we" he is referring to one Talmadge Robinson, an eighteen-year-old boy who went to work with Carl F. Johanson at the same time as did Christensen (Tr. 5).

We contend that the arrangement between Carl F. Johanson and the individuals performing services was merely one under which those individuals would be paid a certain percentage of the profits on each job as wages in lieu of any hourly or weekly rate of pay.

Carl F. Johanson testified that at no time did he ever require the men to put up any money to cover the cost of materials (Tr. 18). The testimony further bears out the fact that the equipment which was used in the enterprise prior to October of 1948 was owned outright by Carl F. Johanson and no title or interest was transferred to any of the other individuals until March, 1949. Johanson testified (Tr. 25):

"After these other men in with us quit last year, we pooled all the resources of the company's assets and

liabilities and made each one responsible and the company owned the equipment and everything like that.”

In other words, by his very testimony Johanson is admitting that prior to October, when a general partnership was formed, that no partnership existed in fact. He further testified (Tr. 25) with reference to the partnership which was formed in October, 1948:

“Question: You didn’t start that until 1949?

“Answer: We did last year as soon as these four began. Willard joined after the rest of the Norwegians quit—after the rest of the other men quit. From then on we worked as a full partnership although it was verbal.”

Again, you can see that Carl F. Johanson recognized the fact that prior to October, 1948, the men who were performing services were not partners.

From the beginning until the partnership was formed, Carl Johanson took for himself 10 percent of each job where no material was furnished as recompense to himself for the use of his equipment, and he took 5 percent of the contract price in cases where material was furnished. In other words, there was no contention at any time in the testimony that Carl F. Johanson had ever transferred or intended to transfer any interest in the equipment or operating assets to any of the other individuals concerned. To the contrary, he, at all times, retained full title, right, and interest in the equipment. The rest of his operations were, during the period in question, carried on in a manner entirely consistent with his operations as an individual. Johanson, except for one or two instances, obtained

the building contracts, and, of course, it must be borne in mind that the contractor's license was in his name under the style of Johanson Brothers Builders. When he commenced operations and took out the contract in that name, he testified that "he had in mind that he was establishing a brotherhood," and that the word "brothers" did not refer to blood relatives.

He was operating a farm during at least a part of the time, and all monies which he received from sale of farm produce went into his bank account which was maintained jointly with that of his wife, and all the monies received from the brick laying contracts also went into this same bank account and the funds were co-mingled and undivided (Tr. 33). Johanson testified that he did keep the monies from his brick laying enterprise separate in a check book and that he had arranged that checks would be honored where they were signed either by his wife, individually, himself, individually, or Johanson Brothers, by Carl F. Johanson.

Again, calling the court's attention to the 5 and 10 percent deduction for the use of equipment, we refer to the testimony of Carl F. Johanson (Tr. 26). With reference to the commencement of the full partnership, Johanson testified that he no longer received this percentage for the use of the equipment.

While the appellants, in their brief, contend that a partnership existed and that the facts are consistent therewith, we call the court's attention to the testimony of Carl F. Johanson (Tr. 31) in which he says:

"The Referee: Now, did you consider you had a partnership?

C. Johanson: A joint agreement, not a partnership.”

Although prior to October, 1948, there were, at various times during that year, 17 different individuals engaged in performing services in Johanson's brick laying enterprise, there is no indication that their coming or going disturbed the working arrangement in any manner whatsoever. When they quit or their services were terminated, it appears that they were merely given a statement as to what jobs they had performed services on and what their share of the profit on those jobs was.

We contend that the testimony supports the findings of fact of the representative and the Referee and that, therefore, the Commission's findings are conclusive in that the jurisdiction of this court is confined to the questions of law. There appears to be no contention that the services were performed outside the usual course or outside the places of business of Carl F. Johanson or that any of these individuals performing services for Johanson for wages were independently established in a business of the same nature as that involved in their contract of service.

We further submit that the entire arrangement had as its primary purpose that of establishing a means of determining the rate of pay of each of the individuals concerned and that the amounts which the individuals were paid constituted wages within the meaning of the Act. The Commission and its representative found that the facts did not support a finding that a partnership existed, and their findings are conclusive.

CONCLUSION

We respectfully submit, therefore, that prior to October, 1948, Carl F. Johanson was an employer under the meaning of the Act and further that all the other workmen concerned in this matter were performing services for Carl F. Johanson for wages.

Respectfully submitted,

CLINTON D. VERNON
Attorney General

FRED F. DREMANN, *Special*
Assistant Attorney General