1979

Charles Kinne v. Industrial Commission of Utah : Brief of Defendant State Insurance Fund

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

CHARLES KINNE, Plaintiff,	:	
vs.	:	Case No. 16447
THE INDUSTRIAL COMMISSION OF UTAH, SUSAN WYNN, and THE STATE INSURANCE FUND, Defendants.	:	

WRIT OF REVIEW FROM A FINAL ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF DEFENDANT STATE INSURANCE FUND

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff is seeking review of an Order of the Industrial Commission of Utah awarding workmen's compensation benefits to Susan Wynn as the dependent widow of Max L. Wynn.

DISPOSITION BY THE INDUSTRIAL COMMISSION

On March 27, 1979, the Industrial Commission entered a final Order awarding Susan Wynn the statutorily prescribed death benefits for the death of her husband Max L. Wynn, who was killed while in the course and scope of his employment with Charles Kinne and Freeport Transport, Inc.

RELIEF SOUGHT ON REVIEW

Plaintiff Charles Kinne is seeking to have the Order of the Industrial Commission set aside as it pertains to him personally.

Defendant State Insurance Fund, as the workmen's compensation insu... for Freeport Transport, Inc., requests that the finding of joint and several liability of Kinne be affirmed on review.

STATEMENT OF FACTS

In addition to those facts set forth in the brief of plaintiff Charles Kinne, and as a supplement thereto, defendant State Insurance Fund would note that it is undisputed that Charles Kinne owned the vehicle in which Max L. Wynn was riding at the time of his death, that Kinne was responsible for paying the deceased his wages, and that Kinne both agreed by contract to retain the right to hire and fire drivers for his trucks and exercised that right in fact.

The State Insurance Fund has paid Susan Wynn the benefits provided for in the Order of the Industrial Commission and expresses no opinion on plaintiff Kinne's assertion that Mr. Wynn was not within the course and scope of his employment at the time of his death. However, the Fund believes the finding of joint and several liability between Kinne and Freeport Transport, Inc., should be affirmed.

ARGUMENT

POINT I. CHARLES KINNE WAS THE DIRECT EMPLOYER OF MAX L. WYNN AND AS SUCH IS LIABLE TO HIS DEPENDENTS FOR THE STATUTORILY PRESCRIBED WORKMEN'S COMPENSATION BENEFITS.

The essential error in Mr. Kinne's assertion that he was not the employer of Max L. Wynn at the time of his death stems

from a fundamental misunderstanding of the nature of the employer-employee relationship as it has been developed under Utah's Workmen's Compensation Act, Utah Code Ann. §35-1-1, et seq. (1953). Our statute, like most compensation legislation, contains no precise or exhaustive definition of employment. The basic definition of "employer" is found in Utah Code Ann. §35-1-42(2) (Supp. 1979), which provides in relevant part that the term includes

> Every person, firm and private corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written . . .

This admittedly vague definition has been interpreted by this Court, since the inception of workmen's compensation, to include all those employer-employee relationships which were included within the traditional common law criteria for defining a master and servant relationship. In early cases decided under the Act, this Court suggested the following tests for determining who was a servant's employer in the absence of an express contract of employment: (1) who was responsible for the selection and employment of the servant; (2) who paid the servant's wages; (3) who had the power to discharge the servant; (4) who had control over his actions; and (5) whose work was being done and who was receiving the benefit of the servant's labors. See Murray v. Wasatch Grading Company, 73 Utah 430, 274 P. 940 (1929); Weber County v. Industrial Comm'n, 93 Utah 85, 71 P.2d 177 (1937).

Experience in other jurisdictions which had adopted these same criteria for determining the existence of the employme relationship made it apparent that the beneficial goals of workme compensation legislation were often undermined by a strict applic of such master and servant principles. This resulted from the unfortunate propensity of some of those engaged in various forms of commerce to seek to avoid any responsibility to insure their workers by characterizing those performing labor for them as independent contractors. Thus, a primary employer would contract with another individual to secure the performance of certain tasks this latter individual would provide the laborers, pay them from his own revenues, direct them in most of the aspects of their performance while at work and retain the power to discharge them. In return, the secondary employer would receive a specified sum for completing the directed task. All too often this type of arrangement ended with the employee who was injured on the job discovering both that he had no claim for compensation against the primary employer because of the lack of incidents of the normal master-servant relationship, and that the secondary employ had not procured insurance and had no assets available to satisfy any civil judgment obtained.

To remedy this situation, almost all legislatures adopt the concept of "statutory" or constructive employer. This desig of certain primary employers, such as general contractors, as statutory employers dictated that such persons had the responsibi

to ultimately guarantee that all workers over whom they had some significant rights of supervision and control, and who were working at tasks which were a part of the business of the primary employer, were covered by the provisions of workmen's compensation.

As this Court noted, the purpose of such legislation was:

> to protect employees of minor contractors against the possible irresponsibility of their immediate employer, by making the principle employer, who has general control of the business in hand, liable as if he had directly employed all who worked upon any business which he has undertaken.

Lee v. Chevron Oil Co., 565 P.2d 1128, 1130 (Utah 1977).

In Utah, this remedial legislation was enacted by including the following language in the section defining employers covered by the Act:

> Where any employer procures work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all sub-contractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this section, employees of such original employer.

Utah Code Ann. §35-1-42 (1953).

As previously stated, the purpose of this legislation was to benefit workmen by expanding their protection under the Act and providing for compensation in situations where a true employee-employer relationship did not exist.

In the instant case, there was no express or implied contract of hire between Max Wynn and Freeport Transport, Inc. However, there was a contract between Freeport and Kinne, whereby Kinne agreed to lease Freeport a tractor and trailer and provide a driver for the unit. Max Wynn was the driver.

There was no question that Freeport Transport exercised enough control and supervision over Max Wynn to bring them within the definition of employer contained in Utah Code Ann. §35-1-42(2) (Supp. 1977), and this finding is not being challenged. Kinne, however, is seeking to be relieved of his compensation liability because of Freeport Transport's involvement in the matter. Such a ruling would be wholly inconsistent with the established princip of workmen's compensation law.

Prof. Larson, in his treatise on Workman's Compensation Law, has noted that a vast majority of states have enacted "contra under" provisions which impose on general employers a compensation liability to the employees of contractors with whom they deal. Wh the statutory pattern of these provisions vary, the general rule is that "the general contractor who has been required to pay compensa . . . can obtain reimbursement from the subcontractor, unless they have altered this normal pattern by specific agreement." 1B A. Larson, Workmen's Compensation Law §49.11 at 9-2 (1979). See also Blevins & Montgomery Builders, Inc. v. Gregory, 371 S.W.2d 942 (Ky. 1963); Jones v. Southern Tupelo Lumber Co., 257 La. 869, 244 So.2d 815 (1971).

Utah's statute is silent on the subject of whether a general contractor is secondarily, jointly or primarily liable for payment of compensation, but the State Fund would submit that in the absence of any statutory enactment to the contrary, employers' liability must be joint and several to insure the broadest protection for employees and to encourage subcontractors to comply with the mandate of the Compensation Act.

In this case, Kinne agreed contractually with Freeport to provide workmen's compensation insurance for his driver, but failed to do so. If he were allowed to escape all financial responsibility for this failure, it would be an invitation for small contractors to intentionally avoid obtaining insurance for their employees, in direct violation of Utah Code Ann. §35-1-46 (1953).

Plaintiff has cited cases which stand collectively for the proposition that Freeport Transport exercised sufficient control to be deemed an employer of Max Wynn. This contention is not being disputed. However, there is nothing in plaintiff's brief or the organic law of the State to suggest that Freeport's status as an employer eliminates Kinne as an employer and extinguishes his legal obligations.

In Harry L. Young & Sons, Inc. v. Ashton, 538 P.2d 316 (Utah 1975), this Court indicated that

> The main facts to be considered as bearing on the [employment] relationship here are: (1) whatever covenants or agreements exist concerning the right of direction and

> control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment . . .; and (4) the furnishing of equipment.

538 P.2d at 318.

In the instant case, Kinne contracted with Freeport to retain the exclusive right to control and direct Max Wynn; he had the right both to hire and fire Wynn; he was responsible for paying Wynn's wages, and he owned the truck and trailer Wynn used in performing his duties. Under any imaginable interpretation of the facts here presented, Kinne was clearly an employer of Wynn. His attempt to have this Court create a judicial exception to an employer's compensation liability when there is found to exist two parties who qualify as employers should be rejected in favor of the more logical and equitable approach adopted by the Industr Commission of imposing joint and several liability. It is not a question of either/or; it is both.

Even if this Court were disposed to attempt to make a comparison of the employers' actions to determine which should exclusively bear the liability for compensation, application of t tests set forth in the Ashton case, supra, would clearly point to Kinne as the party to be considered exclusively liable.

CONCLUSION

Plaintiff has urged this Court to adopt a rule of law providing that only one party can be deemed liable for an employe compensation benefits. Such a rule is without foundation in our

statute, would be inconsistent with the practice in other jurisdictions, and contrary to the unquestioned objective of compensation legislation in providing the broadest coverage possible to injured employees. Plaintiff has provided no authority for the proposition that there can be only one employer for compensation purposes and such a holding would encourage small contractors to try to circumvent the requirements of state law that all employers must provide compensation coverage for employees. The defendant State Insurance Fund therefore respectfully requests that the Order of the Industrial Commission imposing joint and several liability be affirmed.

Respectfully submitted this _____ day of September, 1979.

M. David Eckersley
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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were sent to the following this _____ day of September, 1979:

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