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Workmen's Compensation-Who Is an "Employee" Under the Act

Workmen's Compensation—Who Is an "Employee" Under the Act.—This was an appeal from an award made by the majority of the full Industrial Board of Indiana. From an award denying compensation to appellant for the death of her husband, the appellant appealed to the Appellate Court of Indiana. The case was submitted on an agreed statement of facts, which showed that at the time of his death, decedent had the title of vice-president of appellee, Dusenberg, Incorporated, then under the control of the Auburn Automobile Company. The services the decedent rendered appellee consisted solely of carrying on appellee's engineering and experimental work, of which he was in charge, and of drawing plans of automobiles and motors, as well as often supervising and aiding in their construction. For these services decedent was paid a yearly compensation of $15,000. Decedent also owned a small portion of the stock of appellee, but was at all times under the direction and control of superior officers, so that even his hiring and discharge of the engineers working under him was subject to approval. While driving a car, belonging to appellee and under appellee's orders, decedent met with the accident which resulted in his death. The only question in dispute was whether decedent was an employee of the appellee within the meanings of the statute. Held, decedent was not an "employee" within the meaning of the Workmen's Compensation Act.[1]

The question of who is an "employee" under the Workmen's Compensation Act is a perplexing problem. In the instant case, there were two judges dissenting; one so strongly that a separate dissenting opinion has appeared.[2] To analyse the problem of the principal case successfully it is first necessary to examine the general provisions of the statute as well as the general rules of law applicable to such provisions, both in Indiana and neighboring states before dealing with the specific cases referred to in the majority opinion.

The Workmen's Compensation Act providing for compensation to be paid employees by employers for personal injury or death by accident arising out of or in the course of employment, also[3] provides that unless the context otherwise requires, "The term 'employee' as used in this act shall be construed to include every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer."[4]

The Act, thus includes employees in all industrial pursuits, except those expressly exempted,[5] namely, casual laborers, farm or agricultural employees

16 12 R. C. L. 262, 51 A. L. R. 78.
17 91 A. L. R. 1297.
1 Duesenberg v. Duesenberg, Inc. (1933), 187 N. E. 750 (Ind. App.).
2 Duesenberg v. Duesenberg, Inc. (1934), 190 N. E. 894 (Ind. App.).
3 Baldwin's Ind. Stat. (1934), Sec. 16378.
4 Baldwin's Ind. Stat. (1934), Sec. 16449 (b).
5 In re Boyer (1917), 65 Ind. App. 408, 117 N. E. 507.

and domestic servants.[6] There has been no express legislative distinction drawn between classes of employees; neither has there been any exemption, express or implied, made of officers, directors, stockholders of corporations, or of persons in employment similar to that of decedent in the principal case. Furthermore, there is authority that the definition of "employee" in the act should be liberally construed.[7]

In Illinois, the court has held that a stockholder and director of a corporation who held office of secretary and treasurer was an "employee" within the meaning of the act.[8] The court said, "The only circumstance which has any tendency to distinguish this from the ordinary case of employer and employee or master and servant is the fact that Stevens was a stockholder and director and held the office of secretary and treasurer of the corporation. Section 5 of the Workmen's Compensation Act declares that, 'The term employee as used in this act, shall be construed to mean: * * * Second. Every person in the service of another under any contract of hire, express or implied, oral or written.' Stevens was included within the terms of this definition. The act applies automatically not only to the corporation, but to all its employees, regardless of the kind of work in which they may be engaged." It can readily be seen that this construction put upon the word "employee" in an act essentially identical with the Indiana act, differs widely from the reasoning of the Appellate Court in the principal case.

The Michigan court has evidenced approval of the same type of reasoning followed by the Illinois court, saying that, "The mere fact that back of his employment he was a stockholder of the company and acted as its president could not alter the character of his employment. Neither his status as a stockholder nor his position as president obligated him in any way to perform the work of an employee."[9] The court of Massachusetts also has held, in a case where the claimant was a stockholder and treasurer of the corporation, that every person in the service of another under any contract of hire, express or implied, oral or written is an "employee" under the Workmen's Compensation Act,[10] and that one is in "service" of another if bound to submit to the will and direction of the other.[11]

The Tennessee court has held, under the Tennessee act in which "employee" includes every person in the service of the employer, that where claimant was a stockholder, director, and secretary-treasurer of the company and was killed while supervising the operation of the plant, he was an "employee," indicating that the ordinary meaning of those words should not be narrowed or expanded by judicial action.[12]

The Wisconsin court in Milwaukee Toy Co. v. Industrial Commission[13] said that while it was, of course, fundamental that to entitle an injured person or dependents of a deceased person to compensation under the terms of the act the relation of employer and employee must exist, still the fundamental question was whether such person was performing service for another under a contract of hire. And that if the alleged employer is a corporation and the alleged employee has a controlling interest in it, the extent of his holdings and the manner in which he exerts his powers of control may be factors of some force in determining whether the alleged employee is in

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[6] Baldwin's Ind. Stat. (1934), Sec. 16385.
[7] Hurst v. Hunley (1933), 81 Ind. App. 203, 141 N. E. 650.
[8] Stevens v. Industrial Commission (1931), 346 Ill. 495, 179 N. E. 102, 81 A. L. R. 638.
[9] Dewey v. Dewey Fuel Co. (1920), 210 Mich. 370, 178 N. W. 36.
[10] Emery's Case (1930), 271 Mass. 46, 170 N. E. 839.
[11] Cameron v. State Theatre Co. (1926), 256 Mass. 466, 152 N. E. 880.
[12] Alsup v. Murfreesboro Ice Cream Co. (1933), 56 S. W. (2nd) 746 (Tenn.).
[13] (1931), 203 Wis. 493, 234 N. W. 748.

reality an employee of another, but that standing alone, this is a little consequence.

The New York courts have held that one who owned a majority of stock in a corporation, acting as its president, while also assisting in various tasks of manual labor, was not an "employee";[14] but they have also held that where one who was vice-president of a corporation, was employed through the board of directors and owned only a small portion of the stock, receiving a weekly wage and doing work other than under his official capacity, he could properly be classed as an "employee."[15] However, the applicability of these New York decisions to Indiana cases is somewhat nullified by the fact that the section defining "employee"[16] differs widely from the Indiana act.

The case most cited and most heavily relied on by the Appellate Court in the principal case is In re Raynes,[17] an Indiana case. This case attempted to formulate a general concept of the word "employee" and decided that it denoted one "whose remuneration is popularly designated as wages rather than salary; whose compensation for service is not munificent; * * * whose labor is manual, or of a like degree of industrial or commercial importance as manual labor when viewed from the standpoint of individual accomplishment." But the court went on to point out that, "We should not be understood as indicating that any of these tests are decisive, or that one whose earnings are designated as salary, * * * or whose wage is materially more than $24 per week, or whose labor is other than manual, is not entitled to compensation under the act." The court further said, "It appears to us as sound that compensation under Workmen's Compensation Acts cannot be denied one simply because he happens to be president or other executive or managing officer of the corporation that employs him and that that fact alone is not sufficient to eliminate him from among those regarded as employees within the meaning of such acts." It surely cannot be argued that an engineer, draftsman, chemist or any one engaged in experimental work for another is not an "employee" simply because his work is not manual and his salary or wage for his skilled services is large. Moreover, the Indiana Workmen's Compensation Act does not exclude from its benefits one whose remuneration exceeds any specified amount; less than half a dozen of the compensation acts in the United States impose such a limitation.[18]

The other cases relied on by the court in its solution of the present problem were Manfield & Firman Co. v. Manfield[19] and Holycross & Nye v. Nye.[20] Neither of these cases is in point simply because in both cases the claimant owned so large a controlling interest in the defendant company as to be practically the owner. This was not true in the principal case, the decedent owning but a small portion of the stock. In spite of his title of "vice-president," the decedent was not in control of the corporation in any sense of the word.

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[14] Bowne v. S. W. Bowne Co. (1917), 221 N. Y. 28, 116 N. E. 364.

[15] Beckmann v. Oelerick (1916), 174 App. Div. 353, 160 N. Y. S. 791.

[16] Laws 1914, C. 41, Sec. 3, Subd. 4. The New York Act defines "employee" as "a person who is engaged in a hazardous employment in the service of an employer, carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants."

[17] (1917), 66 Ind. App. 321, 118 N. E. 387.

[18] Schneider, Workmen's Compensation Law (1932, 2d ed.), Vol. 1, Sec. 34, p. 268.

[19] (1932), 95 Ind. App. 70, 182 N. E. 539.

[20] (1933), 186 N. E. 915.

The Workmen's Compensation Act itself makes clear the construction to be put upon the word "employee." Nowhere in the act are there any such qualifications mentioned as "manual labor," "munificent compensation," "wages rather than salary." As Judge Dudine in his dissenting opinion so aptly points out, "The context of the act is consistent and reasonable without a different construction of the word 'employee.' The Legislature not having written into the act any provisions for the exclusion of said groups of employees as beneficiaries thereof, this court is not authorized to read such provisions into the act."[21] A recent case decided by the Supreme Court of Indiana is authority for the caution to be exercised in adding qualifying or limiting words to the express provisions of a statute.[22] There was no necessity in the principal case, in light of the facts, for any such sweeping restrictions being read into the act as were approved by the Appellate Court.

It is also interesting to note that the court based its decision entirely upon the three Indiana cases herein examined, having no other authority for its proposition. Likewise, in the original Indiana case, In re Raynes,[23] the court relied almost entirely upon New York decisions, the inapplicability of which has already received comment.

The Appellate Court also attached much weight to the method of computation of insurance carriers in determining the basis for their rates for compensation insurance. How the basis on which the insurance company computes its premium rate for such insurance is of any controlling importance in the question of the meaning of "employee" other than to work an estoppel against the insurance company, is indeed obscure.

R. S. O.

BOOK REVIEWS

Indiana Annotations to Restatement of Law of Contracts. By Hugh E. Willis. (American Law Institute Publishers, 1934, pp. 232.)

Admirable as it is, the work of the American Law Institute in the various sections of the Restatement would be of comparatively little value to the profession and, especially to the Bench and Bar, if it were not supplemented by complete and accurate annotations of the appellate decisions of the respective states. The committee of the Indiana State Bar Association in charge of the Annotations to the Restatement of the Law of Contracts was fortunate in securing the consent of Professor Hugh E. Willis of the Indiana University Law School to take the responsibility for the preparation of the Indiana Annotations. Professor Willis in his preface acknowledges able assistance from several, who were students of the Law School, namely: Charles F. Brewer, J. Bertram Ewer, Harold N. Fields, William Henry Husselman, Alvin Charles Johnson, Samuel Kauffman, Paul Warren Marrs, Leon Harry Wallace and Phillip C. Richman. In the opinion of the reviewer, each member of the profession, teacher, student and practitioner, who aided in this work, is to be congratulated for having made a substantial contribution to the working tools of the profession.

Every reported Indiana case was examined for judicial decision and declaration on the law of contracts, and yet the result of this exhaustive

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[21] Duesenberg v. Duesenberg, Inc. (1934), 190 N. E. 894 (Ind. App.).

[22] Citizens' Trust & Savings Bank v. Fletcher American Co. (1934), 190 N. E. 868 (Ind. App.).

[23] (1917), 66 Ind. App. 321, 118 N. E. 387.