Master and Servant-Workman's Compensation-Casual Employments

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Labor and Employment Law Commons, and the Workers’ Compensation Law Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol8/iss7/7
and efficiency,7 energy,8 experience,9 facilities,10 faithfulness and fidelity,11 fraud or unfairness in previous conduct,12 honesty,13 integrity,14 promptness,15 suitability to a particular task,16 reliability and trustworthiness,17 and quality of previous work18 were elements considerable. In considering the bids involved in the instant case the trustee and advisory board concerned themselves with the facilities ability, and financial condition of the bidders. As the Appellate Court points out, other considerations may have entered into the mental calculations of the trustee and the board. But no indication is made that any improper element was considered.

Here the award was made to one not the lowest bidder and therefore the trustee and the advisory board must have made the award to the person who was in their judgment the best responsible bidder. It is obvious that the discretion granted by the legislature was exercised by this body in making the award. May the court then substitute its judgment for the judgment and discretion granted to a particular body by the legislature? No fraud was shown here in the action of the trustee and advisory board in making the award of the contract and in the absence of fraud or an abuse of their discretion amounting to fraud, the court may not interfere.19 To do this would be to substitute the judgment of the court for the judgment of the body in which the legislature placed such discretion and in effect nullify the discretionary power granted to any such body. There is no ground therefore for the granting of injunction or mandamus20 and the judgment was properly reversed in favor of the appellants.

J. S. H.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—CASUAL EMPLOYMENTS.—The appellant was employed in helping the appellee tear down a barn on the land occupied by the appellee as tenant. The appellant had never worked for the appellee before that day. The appellant had been a sheet metal worker until physical incapacities forced him out of that employment. For three years preceding the accident he had performed odd jobs, and within the last year he was not employed in any labor.

7 Renting v. Titusville (1896), 175 Pa. 512, 34 Atl. 916.
8 Kelly v. Chicago (1871), 62 Ill. 279.
9 Kelly v. Chicago (1871), 62 Ill. 279; Gilmore v. Utica (1892), 131 N. Y. 26, 29 N. E. 841; Renting v. Titusville (1896), 175 Pa. 512, 34 Atl. 916.
10 Gilmore v. Utica (1892), 131 N. Y. 26, 29 N. E. 841.
11 McClain v. McKisson (1896), 54 Ohio St. 673, 47 N. E. 1114.
12 Jacobson v. Bd. of Education, (1906), (Vt.), 64 Atl. 609.
14 Inge v. Bd. of Public Works (1903), 135 Ala. 137, 33 So. 673.
15 Renting v. Titusville (1896), 175 Pa. 512, 34 Atl. 916; McClain v. McKisson (1896), 54 Ohio St. 673, 47 N. E. 1114.
16 Stuewe v. Hudson (1912), 44 Mont. 429, 120 Pac. 495.
17 Kelly v. Chicago (1871), 62 Ill. 275; Denver v. Dumars (1904), 33 Colo. 94, 80 Pac. 114.
18 Barber Asphalt Paving Co. v. Trenton (1907), 74 N. J. L. 430, 65 Atl. 873.
19 Kitchel v. Bd. of Commissioners of Union County (1889), 123 Ind. 540, 24 N. E. 366; Kraus v. Lebman (1907), 170 Ind. 498, 88 N. E. 714; Windle v. City of Valparaiso (1916), 62 Ind. App. 342, 113 N. E. 429; Lincoln School Township v. Union Trust Co. of Indianapolis (1905), 26 Ind. App. 113, 73 N. E. 623.
20 Seward v. The Town of Liberty (1895), 142 Ind. 551, 42 N. E. 39; Kitchel v. Bd. of Commissioners of Union County (1889), 123 Ind. 540, 24 N. E. 366; Windle v. City of Valparaiso (1916), 62 Ind. App. 342, 113 N. E. 429; Bd. of Commissioners of Newton County v. State ex rel. Bringham (1903), 161 Ind. 616, 69 N. E. 442.
There was no agreement as to wages; the appellee told the appellant that he could not pay him very much and the appellant in effect said that he did not care how much it was so long as he got something. The Industrial Board on the facts found the employment to be casual and not in the usual course of the defendant's business; therefore there was no award to the appellant. From this decision the appellant appeals. Held, award affirmed. There was evidence here sufficient to sustain the finding of the Industrial Board.¹

To be entitled to compensation under the Workmens' Compensation Act the worker must be found to be an employee.² However not all employees are within the statute. The employee whose employment is "both casual and not in the usual course of the trade, business, occupation or profession of the employer" is not within the benefit of the statute.³ Both elements are said to be necessary to make the exception.⁴ In some states the statute allows either of the characteristics of the employment to make the exception.⁵

Casual employment is "one that comes without regularity and is occasional and incidental."⁶ This is the rule announced in the Gaynor Case, and which is followed in the majority of the states where both characteristics of the employment must be shown. Little more than this test for casualness of employment can be found in the cases. The Wisconsin court elaborated further "an employment that is only occasional, or comes at uncertain times, or at irregular intervals and whose employment cannot be reasonably anticipated as certain or likely to occur or to become necessary or desirable is but a casual employment."⁷ No case has been found in Indiana or the states where the statute is similar, where the court found that the employment was not in the usual course of the employer's business and not casual, thus allowing the employee to recover. The reason for this seems obvious; if the employer employed an employee steadily it would seem that that employment would be in a business of the employer.

In determining what employment is in the usual course, trade, business, etc., of the employer the courts have not always agreed. Odd jobs about a residence or a farm are universally held to be outside the business of the employer.⁸ Where the workman is hired to make repairs and additions to the physical plant of an established business, the employment is generally held to be in the usual course of the business of the employer;⁹ however,

¹ Craiger v. Koch, Appellate Court of Indiana, October 6, 1922, 182 N. E. 538.
² Muncie Foundry and Machine Co. v. Thompson (1919), 70 Ind. App. 157, 123 N. E. 196.
³ Burns' Ann. Ind. Stat. 1929, Secs. 9454, 9518 (B).
⁵ Mitchell v. Maine Feldspar Co. (1922), 151 Me. 455, 115 Atl. 287, 11 Cal. R. 221.
⁷ Holmen Creamery Ass'n v. Industrial Comm. (1918), 167 Wis. 470, 167 N. E. 808.
there is authority to the contrary. It is submitted that the majority
view is correct. Repairs and additions to the physical plant are necessary
to the continued life of a business. Thus persons employed for a short
time for these repairs and additions are in the course of the employers'
business. Imposing liability on the employer for injuries from such
employment is not a hardship. Employers protect themselves from the
risks of industrial accident by insurance. The premium of such insurance
in practice is based upon the estimated payroll for the year. At the end
of that period there is an adjustment with the actual payroll. Thus by
merely adding the wages of casual laborers for repairs and additions to
the plant, to the actual payroll, the employer can get adequate insurance
protection; and the social interest in the freedom of the workers from
the risks of industrial accidents as embodied in the statute is carried out.

There is no strict uniformity in decisions where the employer is repair-
ing a house for rent; though the majority hold that it is not in the usual
course of the employer's business. This result where the employer has
a few houses is correct; for it is impossible, due to the insurance practice,
to get adequate insurance protection except at a cost out of all proportion
to the risk involved. Some courts seem inclined to go too far in protecting
the employers of workers to repair buildings that are not industrial. Others,
however, hold large building operators liable under the act for
injuries to casual workers engaged in the repair of buildings, and it would
seem correctly so. It can hardly be said that the owning of a large
apartment or office building is not a business. The workers engaged in
making repairs there seem to be entitled to as much protection as those
making repairs to the plant of an industrial concern under the theory
of the Workmens' Compensation Act. Furthermore the employer in this
factual set up would be able to get adequate insurance protection.

Where the owner of residences undertakes tentative repairs on a house
and hires workers for this purpose intending to cut out the expense of
a contractor, courts hold that the employment is in the usual course of
the employer's business. There are good reasons for this result. The
contractor would have been liable to his worker under the act, and would
have carried insurance to cover this risk. Thus the owner by saving the
expense of the contractor saves the cost of the insuring the risk of accidents
on the job, and at the same time shifts the risk to the worker. This would

(1918), 167 Wis. 470, 167 N. W. 808; State ex rel. v. Lungreen v. District Court
(1918), 141 Minn. 83, 169 N. W. 483.
20 Packett v. Moretown Creamery Co. (1917), 91 Vt. 97, 99 Atl. 638; Holbrook
21 11 Cal. L. R. 221, 237.
22 Zuidler v. Frueher (1926), 85 Ind. App. 627, 154 N. E. 35; Crickmore v.
30 Cal. App. 274, 157 Pac. 1140; Mason v. Wampler (1929), 89 Ind. App. 483, 166
23 11 Cal. L. R. 221, 237.
24 Holbrook v. Olympia Hotel Co. (1918), 200 Mich. 597, 166 N. W. 876. See
25 Johnson v. Choate (1918), 284 Ill. 214, 119 N. E. 972; Davis v. Ind. Comm
(1921), 297 Ill. 29, 130 N. E. 333.
26 11 Cal. L. Rev. 221, 235, 237.
27 Domer v. Castator (1924), 82 Ind. App. 574.
seem to be a result contrary to the spirit of the statute, namely, protecting
the worker from risks of industrial accidents, in the course of their em-
ployment.18

The principle case is correct on authority19 and also on policy. A man
calling another to do an odd job for him cannot obtain insurance save
at a rate out of all proportion to the risk insured against. The cost of
underwriting demands that no policy be issued except at a substantial
premium; a premium often greater than the whole wages paid the workman.
In addition the necessity often arises suddenly and gives no time to secure
insurance. The average man, in spite of any presumption that the law
may indulge in, is ignorant even of the most discussed legislation. To
impose compensation under these circumstances in every case where a
man hires another to do an odd job, might be to entrap a moderately pros-
perous citizen into financial ruin.20

A. S. M.

Pleadings—Construction of Complaint and of a Plea in Abatement.
—In two recent Indiana cases the question of the construction of the
pleading has been involved. In an action by a Massachusetts corporation
against a Missouri corporation upon a note signed in St. Louis payable
in Massachusetts, the defendant filed a plea in abatement questioning the
jurisdiction of the court; although, property of the defendant had been
attached under Burns' Ann. St. 1926, Section 981. From a judgment
abating the action the plaintiff appealed. Held, that the trial court had
jurisdiction and that a plea in abatement is a dilatory plea, construed
without any intendments in its favor.1

In another recent case, an action for an injunction, the several defend-
ants filed joint and several demurrers. The trial court sustained the
demurrers as to all the defendants, and the plaintiff, having refused to
plead further, appealed. Held, in reversing the judgment as to all the
defendants except one; the trial court said that such words as "dangerous,
hazardous, perilous, and unsafe" are conclusions of fact, and may be
considered in determining the sufficiency of a complaint as against a
demurrer for want of facts; while, such words as "wrongfully, unlawfully,
arbitrarily, void, illegal, etc.,” are legal conclusions and cannot be con-
sidered in determining the sufficiency of the complaint as against a
demurrer.2

The common law rule was that pleadings were to be construed against
the pleader.3 However, a more liberal rule is to be preferred, one that
will give effect to all the material allegations whenever reasonably possible.4
Thus the liberal rule of construction which our code of civil procedure
attempts to establish seems to be highly desirable. The statute says,
"In the construction of a pleading, for the purpose of determining its

11 Cal. L. R. 238.
20 See note 8 and note 12, supra.
11 Cal. L. R. 221, 237.
1 Dodgem Corporation v. D. D. Murphy Shows, Inc., Appellate Court of Indiana,
2 Regester v. Lincoln Oil Refining Co., et al., Appellate Court of Indiana, Jan. 4,
1932, 183 N. E. 693.
3 Burrows v. Yount (1843), 6 Blackford 458.
4 Flint, etc. Manufacturing Co. v. Beckett (1906), 187 Ind. 491, 79 N. E. 505.