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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003111-WC

RONALD BRUCE YANTIS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-94-43148

DAVID HALL and VICTOR HALL, d/b/a
HALL & HALL CONSTRUCTION CO.;
OLD REPUBLIC INSURANCE COMPANY;
IRENE STEEN, Administrative
Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

AND: NO. 1997-CA-003314-WC

DAVID HALL and VICTOR HALL, d/b/a
HALL & HALL CONSTRUCTION CO.; and
OLD REPUBLIC INSURANCE COMPANY — CROSS-APPELLANTS

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-94-43148

RONALD BRUCE YANTIS;
IRENE STEEN, Administrative
Law Judge; and
WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION

VACATING AND REMANDING NO. 1997-CA-OO3111-WC

AND

DISMISSING NO. 1997-CA-003314-WX

** ** ** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, Judge. The issue we are called upon to decide is whether the Administrative Law Judge erred when she determined that Ronald Bruce Yantis was not a "loaned servant" or "special employee" of David Hall and Victor Hall, d/b/a Hall & Hall Construction Co. (Hall), on September 1, 1994, when he fell from the roof of a house under construction and was seriously injured, resulting in a finding by the ALJ that he is totally occupationally disabled, and whether the Workers' Compensation Board erred in affirming the ALJ's decision. Hall and its insurer, Old Republic Insurance Company, have filed a protective cross-appeal.

Yantis was employed by Thomas Hamilton, doing business as Silverton Hill Farm, as a general farm laborer on Hamilton's 750-acre farm and two other farms. Yantis was described by the Board as a "jack-of-all-trades." He fed cattle and dogs, assisted with the building of farm roads and small bridges, cut and put up hay, and, occasionally, assisted in building barns and repairing roofs. Yantis has a limited education and is unable to read or write.

In 1993, Hamilton orally contracted with Hall to build a large house on property adjacent to his farm. Hamilton agreed to pay Victor and David Hall $20.00 per hour for their labor and to

pay Hall's employee expenses. Hall was to furnish all required tools and pay its own liability insurance premiums, while Hamilton agreed to reimburse Hall for workers' compensation insurance premiums paid for coverage for Hall's employees. In addition, it was agreed that Hamilton would make several of his farm employees available to work on the house when their services were not otherwise being utilized to carry out farm-related tasks.

During the summer of 1994, Yantis devoted from 60% to 80% of his time[1] to the construction of the house, with the balance devoted to farm work. Yantis was paid directly by Hamilton for his work on the house as well as for his farm work, but while at the construction site took his orders from David Hall. Hamilton retained ultimate control over Yantis, instructing him when he was to report to the construction site and when he was to engage in farm work, and he alone had the power to discharge Yantis.

Yantis' injury occurred on September 1, 1994, while he was assisting David Hall in the construction of the roof of the house. While holding a chalk line, Yantis stepped backward into a chimney hole normally covered by plywood and fell two stories onto a concrete basement floor. As a result of the fall, Yantis sustained multiple facial fractures, a cervical cord contusion,

[1] Yantis testified that he spent approximately 70% to 80% of his time working at the construction site. Hamilton, on the other hand, testified that Yantis spent approximately 60% of his time working on the house. In any event, Yantis was instructed that his first priority was his farm-related duties.

fractures to the thoracic discs at the T2, T3 and T4 levels, and a fracture of the right patella. Following an administrative hearing before the ALJ, Yantis settled his workers' compensation claim against Hamilton for $50,000.00, reserving his right to proceed against Hall.

The Board held that Hall was not a "statutory employer" under the loaned employee doctrine[2] because there was not an implied contract for hire between Yantis and Hall Construction. The Board said that "[al]though it is not necessary for a contract of hire to be in writing, all of the elementary ingredients of a contract must be present."

> Moreover, the most basic requirement[,] that is, a meeting of the minds, is simply not present under the factual circumstances in this case. Yantis never intended to become employed by or enter into a contract of hire with Hall . . . [and Hall] never intended or considered Yantis as one of its employees.

The Board, however, determined that Yantis satisfied the other essential criteria of the loaned employee doctrine.[3] The only issue on appeal is whether the Board and the ALJ correctly determined that there was not an implied contract of hire between

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[2] Referred to in earlier cases as the "loaned servant" doctrine.

[3] That determination, challenged in Hall's cross-appeal, will be addressed in due course.

Yantis and Hall. We believe, contrary to the ALJ's opinion and the Board's decision, that the record compels such a finding.

It has long been recognized under Kentucky workers' compensation law that whenever a general employer sends a worker to assist a special employer that worker may become a "loaned employee" of the special employer. In such cases, the special employer becomes the "statutory employer" within the meaning of Ky. Rev. Stat. (KRS) 342.700. See Allied Machinery, Inc. v. Wilson, Ky. App., 673 S.W.2d 728 (1984). See also United Engineers and Constructors, Inc. v. Branham, Ky., 550 S.W.2d 540 (1977); Rice v. Conley, Ky., 414 S.W.2d 138 (1967); Wright v. Cane Run Petroleum Co., 262 Ky. 251, 90 S.W.2d 36 (1935); and Brown v. Tennessee Gas Pipeline Co., 623 F.2d 450 (6th Cir. 1980). For the "loaned employee" doctrine to apply, a three-pronged test must be met. It must be shown that: (1) the worker has an express or implied contract of hire with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has a right to control the details of the work. Allied Machinery, 673 S.W.2d at 730 (citations omitted).

The record before us reveals that the three-pronged test has been met. First, although Yantis and Hall did not formally agree to enter into an employer-employee relationship, Yantis unquestionably knew that he was to work under Hall's direction and control, and he assented to that arrangement by regularly appearing at the job site and carrying out the work he was assigned to do by

Hall. This is sufficient to established an implied contract of employment between Yantis and Hall. As this Court said in Allied Machinery, 673 S.W.2d at 731:

> While earlier cases have attempted to narrow the scope of employer immunity by focusing the contract relationship between the employee and the employer whose work was being done at that time (Rice, supra), more recent cases have effectively broadened its scope by focusing on who had the right to control the details of the work at the time of the injury. See United Engineers and Constructors, Inc. v. Branham, [supra]; Brown v. Tennessee Gas Pipeline Co., [supra].
>
> Indeed, Justice Palmore, expressing the opinion of a unanimous court in Branham, stated that "the main dispositive criterion" is the alleged principal/master's right to control the details of the work at the time of the injurious event.

There is no question but that Yantis performed work for Hall Construction under the immediate direction and control of David Hall and that he was performing Hall's work. There is a clear implication of assent by Hall Construction and Yantis to the establishment an employer-employee relationship. See Louisville & N. R. Co. v. Pendleton's Adm'r, 126 Ky. 605, 104 S.W. 382, 385 (1907). The fact that Hamilton retained the ability to direct

Yantis when to work for Hall Construction is not a dispositive factor. In all cases, the general employer maintains the ability to direct the employee when to work for the special employer. A contract of hire can be implied from the fact that the employee assented to the directions given by one other than his general employer.

In Branham, supra, a tort action was filed against the general contractor of a construction project. The plaintiff, Branham, was a member of a crane operating crew leased to the general contractor along with a crane by a heavy equipment operator. Branham and the other member of the crane's operating crew were in charge of the crane. At the time of the injury, the general contractor, United, had assigned some its employees to assist the crane's operating crew in lowering the gantry of the crane. Branham was injured while disassembling the gantry. Branham collected workers' compensation benefits from the heavy equipment company and then pursued a tort claim against the general contractor, contending that its employees' negligence caused his injuries. The Supreme Court held that United was immune from tort liability under the "contractor-under" statute. Significant to this case, however, was the Court's separate holding that United's employees were lent employees of the crane crew while helping to lower the gantry, and that United was immune from tort liability on that basis. Id. at 547. The Court noted that the "procedure of lowering the gantry was peculiarly within the province and

expertise of the [heavy equipment company's] crew." Id. The Court said that "the employees of United whose negligence is said to have caused the accident were assisting the crane crew in work for which the crane crew was responsible and, in the performance of that particular work, were under the supervision of the crane crew alone, and not of [United's foreman] or United." Id. at 541. The Court determined that United's employees had an implied contract of hire with the heavy equipment company through their assent to the directions of the crane crew.

This Court relied on Branham in Allied Machinery, supra, a case which involved a tort claim filed by an employee of a coal company against Allied Machinery, a repair company. The employee, Wilson, was required by his employer to aid the repair company's mechanic at which time he was injured. Wilson collected workers' compensation benefits from the coal company and then brought a negligence action against Allied. The Court held that Wilson was a "loaned employee" of Allied's:

> Wilson's testimony reflects his knowledge of and assent to working under the direction of Allied's mechanic. Repair of the damage caused by the broken hydraulic pump was essentially the work of Allied. The . . . employees were taking orders from Allied's mechanic during the days it took to repair the truck. We find that Larson's criteria were met.

Allied Machinery, 673 S.W.2d at 730.

Notably, the dissent argued that because Wilson had "absolutely no opportunity to exert or assert a real choice in this matter," there could be no implied contract of hire. Id. at 732. In the present case, the Board adopted a similar argument when it stated in its holding that "there was no informed consent by Yantis to become an employee of Hall Construction." In most cases an employee is faced with a Hobson's choice.[4] An employee can either obey his employer's direction to work for the special employer, or refuse and, more than likely than not, find his employment terminated. Thus, in most cases, the employee does not have a real choice in the matter.

The Board relied on Rice v. Conley, supra, to support its determination that there was no implied contract of hire between Yantis and Hall. Rice does not control the present case. As noted in Allied Machinery, supra, earlier cases, such as Rice, attempted to narrow the scope of employer immunity by focusing on the contract relationship between the employee and the special employer at the time of the injury. Recent cases such as Branham, supra, and Brown v. Tennessee Gas Pipeline Co., supra, focus on who had the right to control the details of the work at the time of the

[4] Hobson's choice is an apparently free choice that offers no real alternative. [After Thomas Hobson (1544-1631), English liveryman, from his requirement that customers take either the horse nearest the stable door or none. The American Heritage Dictionary 615 (1985).]

injury. Justice Palmore, writing for a unanimous court in Branham, said that "the main dispositive criterion is whether it is understood that the alleged principal or master has the right to control the details of the work" at the time of the injury. Branham, 550 S.W.2d at 543. Thus, a contract of hire can be inferred from the employee's acceptance of the special employer's control and direction. Arthur Larson and Lex Larson, Larson's Workers' Compensation §48.15 (1998). See generally 82 Am. Jur. 2d Workers' Compensation § 231 (1994).

In the instant case, the ALJ determined that Yantis was under the direction and control of Hall Construction while working at the construction site. There is clear evidence that Yantis assented to work for Hall Construction. David Hall instructed Yantis to clean the job site, hand workers lumber, perform general labor, including driving nails, all of which work was essentially that of Hall Construction. As a result of Yantis' submission to Hall's direction and control, and Hall's acceptance of him to do its work, an implied contract of hire between Yantis and Hall existed. See Louisville & N .R. Co. v. Pendleton's Adm'r, supra.

Yantis, in fact, worked as a dual employee of both Hamilton and Hall. Larson describes dual employment as follows:

> Dual employment occurs when a single employee, under contract with two employers, and under the separate control of each, performs services for the most part for each employer separately, and when the service for each

> employer is largely unrelated to that for the other. In such a case, the employers may be liable for workers' compensation separately or jointly, depending on the severability of the employee's activity at the time of the injury.

Larson, supra, §48.40. This "dual employment concept was recognized as long ago as 1935 by Kentucky's highest court in Wright v. Cane Run Petroleum Co., 262 Ky. 251, 90 S.W.2d 36 (1935):

> The general employer who carries on a hazardous employment is liable under the Workmen's Compensation Law for injuries sustained or death incurred by his employees arising out of and in the course of their employment, although at the time they were working under the direction of the general employer. In such case, the employer who directs his servant to work for another is regarded in law as the general employer, and the one for whom he works is a special employer, and the relation of employer and employee, in the circumstances, exists between both of them. If the employee is under the exclusive control of the special employer in the performance of work which is a part of his business, he is, for the time being, his employee; yet at the same time, he is the employee of the general employer, as well as the employee of the special employer. And he may,

> under the common law of master and servant, look to the former for his wages and to the latter for damages for negligent injuries; so under the Workmen's Compensation Act he "may so far as its provisions are applicable, look to one or the other, or to both, for compensation for injuries for occupational hazards."

Id., 90 S.W.2d at 39 (citations omitted). Quoted with approval in Marc Blackburn Brick Co. v. Yates, Ky., 424 S.W.2d 814, 818 (1968).[5]

Yantis while under the direction and control of Hall sustained his injury. Hall is, therefore, Yantis' "statutory employer" under both the loaned employee and the dual employee doctrines.

For these reasons, in Appeal No. 1997-CA-003111-WC the Board's decision is vacated and this case is remanded to the Administrative Law Judge with directions to make an award consistent with this decision. The workers' compensation benefits heretofore paid to Yantis by Hamilton shall be credited to any award adjudged to be due from Hall. Cross-appeal No. 1997-003314-WX is dismissed.

ALL CONCUR.

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[5] Hamilton is not a party to this appeal. Hence, we are not called on to decide whether Hamilton or Hall has primary responsibility for the payment of workers' compensation benefits to Yantis.

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