No. 29264 -- Dodson v. Workers' Compensation Division and Brown & Root

Starcher, J., concurring:

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Our workers' compensation law is designed to provide limited benefits to any claimant who has "received personal injuries *in the course of* and *resulting from* their covered employment[.]" *W.Va. Code*, 23-4-1 [1989] (emphasis added). The workers compensation act does require that the claimant be an "employee" -- but loosely defines an employee as a person "in the service of [an] employer[] and employed[1] by them for the purpose of carrying on the industry, business, service or work in which [the employer is] engaged." *W.Va. Code*, 23-2-1a (a) [1999].

To figure out if a claimant was injured "in the course of" employment, you must look at the time, place and manner of his injury: was he in the workplace during work hours doing work-related activities? To figure out if a claimant's injury "resulted from" employment, you must consider whether the claimant was being exposed to a work-related risk, so it can reasonably be said that the injury arose out of the job.

When a candidate for a job goes to a place at the behest of a prospective employer, and is told by the employer to perform a pre-employment test or engage in some physical feat, the candidate

[1]As the majority opinion recognizes in Syllabus Point 3, remuneration is not a necessary requirement for a claimant to be considered as "employed" by an employer. The dictionary definition of "employ" bolsters this conclusion. "Employ" can mean "use to good effect," "hire, engage, enlist, recruit, enroll, sign (up), take on, . . . keep, retain . . . utilize, apply," and so on. Payment in cash in return for services rendered is not an absolute requirement of the statute, nor should it be.

is being tested to see if he or she can do the job. Occassionally, while performing these tests for the employer the candidate is injured. Reason dictates that such injuries are compensible as a work-related injury under *W.Va. Code*, 23-4-1.

First, the injury is in the course of employment because the candidate is at a place chosen by the employer, during a time chosen by the employer, doing a task designated by the employer.

Second, the injury results or arises from the employment because the candidate is being exposed to risks comparable to risks that would occur in the workplace. "[T]he value of any specialized 'tryout' test generally lies in its ability to reproduce, or highlight, actual working conditions." *Laeng Workmen's Compensation Appeals Board*, 494 P.2d 1, 8-9 (Cal. 1972). If you are exposing a candidate for a job to actual or reproduced working conditions, he is being exposed to risks of the employment for the employer's benefit.

Third, the candidate is acting "in the service" of the employer -- the tests being completed in a "tryout" are designed to ensure the candidate is capable of meeting the employer's service needs. Generally, the tests being completed are actual or reproduced working conditions -- and are thereby designed to further the employer's "purpose of carrying on the industry, business, service or work in which" the employer is engaged.

In the instant case, Mr. Dodson appeared at the Brown & Root office, at a time chosen by Brown & Root, and was ordered to perform manual tasks designed to simulate the rigors of employment. Mr. Dodson would be asked to lift heavy items on a Brown & Root jobsite where he could strain his back -- and, not surprisingly, Brown & Root exposed Mr. Dodson to the same risk of injury at the Brown & Root office, where he was asked to lift a heavy item (a bar suspended on a chain below his

knees). A job with Brown & Root required physical exertion -- accordingly, its physical agility test was designed to see if Mr. Dodson was physically capable of acting in the service of Brown & Root, and whether he could be employed for the purposes of carrying out the "industry, business, service or work" of Brown & Root. Under this fact pattern alone, I believe that Mr. Dodson's injuries were compensible.

The majority opinion strains the record to find an offer and acceptance of contractual terms to support its opinion that an employer-employee relationship existed between the claimant and Brown & Root. I believe this was unnecessary.

Professor Larson, in his treatise on workers' compensation law, plainly states that when a candidate is injured while going through a pre-employment physical examination or test, the injury should be compensable. He states:

> Since workers' compensation law is primarily interested in the question [of] when the risks of the employment begin to operate, it is appropriate, quite apart from the strict contract situation, to hold that an injury during a try-out period is covered, when that injury flows directly from employment activities or conditions. . . . It is also appropriate to treat a pre-employment physical examination as part of the employment[.]

2 *Larson's Workers' Compensation Law* § 26.02[6] ("Entering Premises Before Formal Hiring: Try-out Periods and Physical Examinations Before Hiring").

I believe that, in the future, when a claimant is injured while engaging in a "try-out" for a job, the Division should look to *W.Va. Code*, 23-4-1 to consider whether the claimant was acting "in the course of" an assignment by the employer, and whether the claimant's injury "resulted from" some risk comparable to what would be faced on the job. If so, the claimant was likely furthering the interests of the employer's business -- and accordingly, his injury is work-related and compensible.

My dissenting colleagues make light of the fact that the claimant was not on the company payroll, and that Brown & Root required the claimant to pay to complete the pre-employment process. The record certainly shows that Brown & Root went to great lengths to distance itself from job applicants, and made it clear that an applicant had to successfully complete the pre-employment process before being hired. But the fact remains, Brown & Root exposed the claimant to work-related hazards for a work-related purpose -- and to the extent the claimant was injured in the course of and as a result of these work-related hazards, he should be compensated under the workers' compensation scheme.[2]

Contrary to the assertions made by the dissenters, the majority's opinion does not convert the workers' compensation system into a health insurance plan for prospective job candidates. Instead, the system provides limited benefits only for injuries to candidates that occur in the course of and result from the pre-employment tests required by the employer. Injuries which are outside this scheme -- such as from a trip and fall in the employer's parking lot while leaving the pre-employment test -- would still fall within the ambit of the tort system.

The majority's opinion should, however, suggest to the Legislature that some confusion still exists over the extent to which candidates for employment are considered "employees" under *W.Va. Code*, 23-2-1a (a) when those candidates are injured in the course of a pre-employment tryout or physical examination. Accordingly, Legislative action may be necessary to clarify this situation.

I therefore respectfully concur.

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[2]And, of course, when a candidate is injured in the course of and resulting from a job-related "tryout," the employer should receive the immunity from suit provided by the workers' compensation act. *W.Va. Code*, 23-4-6 [1991].