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WORKMEN'S COMPENSATION - DEFINITION OF EMPLOYEE - RELIEF WORKER

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WORKMEN'S COMPENSATION — DEFINITION OF EMPLOYEE — RELIEF WORKER — An unemployed workman applied to a local relief committee, and received a work order on defendant city, based upon his needs and the number of his dependents. Payment was in scrip, which was accepted by merchants, who were later paid out of funds appropriated by the state and federal governments. The man was put to work on a "made work" project which was under the supervision and control of the city officials. The work was necessary and proper to be undertaken by the city. While so engaged, he was injured, and brought an action to recover compensation. *Held,* that the injured workman was an employee of the city within the meaning of the workmen's compensation act,

and entitled to compensation. *Weber County-Ogden City Relief Committee v. Industrial Commission of Utah,* (Utah 1937) 71 P. (2d) 177.

It is thought that the question whether or not the so-called "relief worker" is entitled to the benefits of workmen's compensation was first decided in Michigan. In the case of *Vaivida v. City of Grand Rapids,*[1] the court denied compensation on the ground that, since the municipality was under a statutory duty to support indigent persons, it had a right to their services as a counterpart of this duty to support, and therefore no contractual relationship existed between the relief worker and the municipality. That case aroused considerable comment.[2] Since the decision in that case, numerous courts have passed upon the question, some following the Michigan decision,[3] others adopting the result reached in the principal case.[4] It appears, as the court in the principal case admits, that a majority of the cases dealing with this question hold that the relationship of employer and employee, within the meaning of the workmen's compensation acts, does not exist between relief workers and the municipality or its agents, where the relief worker is engaged in public work as a condition of, or in connection with, his receiving aid from public funds set aside for that purpose.[5] The several workmen's compensation acts commonly define an employee as one engaged in the service or employment of another, or of the state, under an appointment or contract of hire.[6] Since the schemes

[1] 264 Mich. 204, 249 N. W. 826 (1933).

[2] 32 MICH. L. REV. 278 (1933); 47 HARV. L. REV. 362 (1933); 82 UNIV. PA. L. REV. 185 (1933).

[3] Oswalt v. Lucas County, (Iowa, 1937) 270 N. W. 847; Lawe v. Department of Labor and Industries, 189 Wash. 650, 66 P. (2d) 848 (1937); Shelton v. City of Greeneville, 169 Tenn. 366, 87 S. W. (2d) 1016 (1935); Cody v. City of Negaunee, 270 Mich. 336, 259 N. W. 118 (1935); State ex rel. State Board of Charities and Public Welfare v. Nevada Industrial Comm., 55 Nev. 343, 34 P. (2d) 408 (1934); Jackson v. North Carolina Emergency Relief Administration, 206 N. C. 274, 173 S. E. 580 (1934); In re Moore, 97 Ind. App. 492, 187 N. E. 219 (1933); Schmueser v. Copelin, 99 Ind. App. 209, 192 N. E. 123 (1934); McBurney v. Industrial Accident Comm., 220 Cal. 124, 30 P. (2d) 414 (1934); Basham v. County Court of Kanawha County, 114 W. Va. 376, 171 S. E. 893 (1933); Village of West Milwaukee v. Industrial Comm., 216 Wis. 29, 255 N. W. 728 (1934).

[4] Hattler v. Wayne County, 320 Pa. 280, 182 A. 526 (1936); Clark v. North Dakota Workmen's Compensation Bureau, 66 N. D. 17, 262 N. W. 249 (1935); Industrial Commission of Ohio v. McWhorter, 129 Ohio St. 40, 193 N. E. 620 (1934); Garney v. Department of Labor and Industries, 180 Wash. 645, 41 P. (2d) 400 (1935); Benson v. Department of Labor and Industries, 180 Wash. 655, 41 P. (2d) 404 (1935); City of Waycross v. Hayes, 48 Ga. App. 317, 172 S. E. 756 (1934); Forest Preserve District of Cook County v. Industrial Comm., 357 Ill. 389, 192 N. E. 342 (1934).

[5] 96 A. L. R. 1154 (1935).

[6] 2 Mich. Comp. Laws (1929), § 8413; Iowa Code (1935), § 1421; Tenn. Code (1932), § 6852; 2 Nev. Comp. Laws (1929), § 2688; N. C. Code (1931), § 8081 (i); 8 Ind. Stat. (Burn's Ann. 1933), § 40-1701; 2 Cal. Gen. Laws (Deering, 1931), Act 4747, § 6; Utah Rev. Stat. (1933), § 42-1-41; N. D. Comp. Laws (Supp. 1926), c. 5, § 396a2; Ohio Gen. Code (Throckmorton, 1930), § 1465-61; Ga. Code (1933), § 114-101; Ill. Rev. Stat. (State Bar Ed. 1937), § 48-142. But see

for administering relief are varied, the importance of the factual basis of the decision in each case may not be minimized. It is suggested, however, that the fundamental approach taken by the court may be of equal significance in the result reached. In determining whether or not a relief worker is an employee within the meaning of the definition, the courts have commonly pursued three lines of inquiry: (1) an analysis of the purposes of work relief, with particular attention to its relation to other governmental activities; (2) an examination of the facts surrounding the employment as bearing upon the question of control over the relief worker by the alleged employer; (3) an application of the conclusions reached under (1) and (2) to the concept that a contract of hire implies a certain degree of voluntary action on the part of both parties.[7] Compensation is denied where the court takes the view that the state, or political subdivision thereof, in providing work relief, is engaged, not in any employment pursuant to its normal functions, but in the distribution of relief to distressed citizens, and that the furnishing of work is a mere incident thereto to enable an indigent citizen to maintain his self-respect or show his appreciation.[8] A similar result is reached on the theory that the projects carried on under the Federal Emergency Relief Act are entirely foreign to the purposes of the state compensation act, which was intended to apply to the state only when the latter engages in industry.[9] Similarly, the contractual relationship is denied and

Wis. Stat. (1935), § 101.01; W. Va. Code (1931), § 23-2-1; Pa. Stat. (Purdon's Ann. 1931), tit. 77, § 22.

[7] McLaughlin v. Antrim County Road Comm., 266 Mich. 73, 253 N. W. 221 (1934); Gilroy v. Mackie, 46 Scot. L. R. 325 (1909), involving somewhat analogous facts, in which it was argued that the relationship of master and servant did not arise because the indigent person had no choice but to accept the work offered. The court said, 46 Scot. L. R. at 329: "A pauper may be compelled to work in a poorhouse, or a prisoner in prison by force of statute. There is therefore entirely wanting that freedom of contract on both sides which is of the essence of employment as we are using the term 'employment' in the sense of the Act before us. But I am afraid that the difference here is that there is just that question of freedom. The unemployed need not go and ask for work unless he likes, and he need not take the work offered unless the terms suit him. If he does take the work I think he becomes employed."

[8] Lawe v. Department of Labor and Industries, 189 Wash. 650, 66 P. (2d) 848 (1937); Village of West Milwaukee v. Industrial Comm., 216 Wis. 29, 255 N. W. 728 (1934); In re Moore, 97 Ind. App. 492, 187 N. E. 219 (1933). In the Lawe case the court declined to follow the decision in Garney v. Department of Labor and Industries, 180 Wash. 645, 41 P. (2d) 400 (1935), in which compensation had been allowed. The court said [189 P. (2d) at 655]: "In the Garney and Fitzgerald Cases . . . there were involved only workmen employed to do the regular and necessary highway work which the county (the employer) was bound to perform. Here, we have no employer who was bound to perform any work of any character, but . . . we have the sovereign state acting through a special executive agency in conjunction with the Federal Government engaged in distributing relief to its distressed citizens and nothing more." In the Lawe case the relief worker had been put to work by the county welfare board in painting the interior of a building used as a work room by the board.

[9] State ex rel. State Board of Charities and Public Welfare v. Nevada Industrial

compensation refused where the court takes the view that the money is paid the relief worker not as wages for labor, but on the basis of need of support,[10] and the court points out that the relief worker cannot sue to recover his wages.[11] Compensation is also denied where the court finds that the municipality, in distributing work relief, is engaged in discharge of its duty to support indigent persons.[12] In such cases it appears to be immaterial whether or not the municipality can compel services as a condition of the right to support,[13] although some of the cases assert the right of the municipality to the services and earnings of paupers.[14] But where an analysis of the purposes of work relief leads the court to conclude that it was adopted primarily to reduce unemployment,[15] or where the court is inclined to the view that it is more in harmony with the spirit of work relief legislation, and with the desire to foster self-reliance among distressed citizens, to hold a relief worker an employee than a ward,[16] compensation is allowed. A similar conflict in results ensues from the conclusions of the courts along the second line of inquiry. Where the relief worker is neither selected, hired, paid, or subject to discharge by the municipality except for physical incapacity or refusal to do a reasonable day's work, compensation is denied.[17] But where the municipality or its agent has complete control over the relief worker in its service, it is held to be immaterial that it did not fix the wage or select the employee, and compensation is allowed.[18] In the principal case, after pointing out that the city was under no duty to support indigent persons, the court places its decision on the ground that, of the factors usually taken as determinative of the relationship of master and servant,[19] only the

Comm., 55 Nev. 343, 34 P. (2d) 408 (1934).

[10] Ibid.; Jackson v. North Carolina Emergency Relief Administration, 206 N. C. 274, 173 S. E. 580 (1934).

[11] McBurney v. Industrial Accident Comm., 220 Cal. 124, 30 P. (2d) 414 (1934).

[12] Ibid.; Vaivida v. City of Grand Rapids, 264 Mich. 204, 249 N. W. 826 (1933); Village of West Milwaukee v. Industrial Comm., 216 Wis. 29, 255 N. W. 728 (1934).

[13] Village of West Milwaukee v. Industrial Comm., 216 Wis. 29, 255 N. W. 728 (1934).

[14] Vaivida v. City of Grand Rapids, 264 Mich. 204, 249 N. W. 826 (1933); McBurney v. Industrial Accident Comm., 220 Cal. 124, 30 P. (2d) 414 (1934).

[15] Hattler v. Wayne County, 320 Pa. 280, 182 A. 526 (1936). In the English case of Porton v. Central (Unemployed) Body of London, [1909] 1 K. B. 173, in which upon similar facts compensation was allowed, the court also based its decision in part on the view that the primary purpose of the Unemployed Workmen Act was to provide work for the unemployed rather than distribution of charity.

[16] Industrial Comm. v. McWhorter, 129 Ohio St. 40, 193 N. E. 620 (1934).

[17] Oswalt v. Lucas County, (Iowa, 1937) 270 N. W. 847; Lawrence v. City of Detroit, 277 Mich. 73, 268 N. W. 816 (1936); San Bernardino County v. Industrial Accident Comm., 1 Cal. App. (2d) 598, 37 P. (2d) 122 (1934); Basham v. County Court of Kanawha County, 114 W. Va. 376, 171 S. E. 893 (1933).

[18] Forest Preserve District of Cook County v. Industrial Comm., 357 Ill. 389, 192 N. E. 342 (1934); Garney v. Department of Labor and Industries, 180 Wash. 645, 41 P. (2d) 400 (1935).

[19] 1 LABATT, MASTER AND SERVANT, 2d ed., 56-74 (1913), referred to by

fact that the workman was not paid by the city militated against the contention that he was an employee. The court points out that the city's undertaking to furnish work and the workman's acceptance of the employment was wholly voluntary. Thus, where the recipient signs notes to the county in return for relief orders and accepts the county's offer to redeem the same by working on county highways; [20] or where a drought sufferer enters into written work agreements in consideration for relief, and the son is injured while working out the agreements,[21] the relationship of employer and employee is held to exist and compensation is allowed, the theory being that the relationship was voluntarily entered into by both parties. It is submitted that the court reached a proper result in the principal case in view of the circumstances that the workman's acceptance of the employment was voluntary, that the work was prosecuted under the control and supervision and inured to the benefit of the city, and was terminable by it, and because of the probable social desirability of the decision.

the court in the principal case, in which the factors are enumerated as follows: (1) exercise of control over details of the work; (2) payment of consideration; (3) power of appointment; (4) power of dismissal; (5) for whose benefit the given work is done.

[20] Clark v. North Dakota Workmen's Compensation Bureau, 66 N. D. 17, 262 N. W. 249 (1935).

[21] Marathon County v. Industrial Comm., 218 Wis. 275, 260 N. W. 641 (1935).