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

FILED
December 11, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
December 12, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

I dissent because I believe the WCAB's finding that no contract of employment existed between the claimant and B&R on July 31, 1998 is not "plainly wrong." The majority opinion states that the critical question which must be resolved is whether a claimant "was in the service of the employer for the purpose of carrying on the employer's industry, business, service or work while serving under a contract for remuneration." The opinion then disregards this analysis and finds that a contract of employment existed between the claimant and B&R on July 31, 1998 because he agreed to take a safety class and undergo pre-employment testing.

The record clearly shows that B&R did not hire the claimant prior to completing the testing and neither was B&R paying him at that time. In fact, whether the claimant would be hired or not was contingent on the results of the testing. Moreover, not only was the claimant not on the company's payroll, but the claimant himself paid $50 to participate in the pre-employment exercises. I have not met too many people, if any, who would go to work pursuant to an "employment contract" and not only work for free, but actually expend money from their own pockets and then consider themselves to be employees. If I am spending my money to search for a job, I do not believe that I am an employee of any company. Nonetheless, the majority somehow finds that B&R benefitted from the testing, so the claimant was an

"employee . . . for the purposes of worker's compensation." If a person is not an employee for any other reason, I do not believe that person is an employee for purposes of worker's compensation.

Several courts in other jurisdictions have addressed the precise issue presented to this Court and have denied workers' compensation benefits. In *Rastaetter v. Charles S. Wilson Memorial Hosp.*, 436 N.Y.S.2d 47, 47 (N.Y. App. Div. 1981), the court addressed the question of "whether an individual who is required to undergo a pre-employment physical examination should be considered an employee, within the meaning of the Workers' Compensation Law, with respect to injuries arising out of the pre-employment physical examination." The court in *Rastaetter* held that such an individual was not an employee for workers' compensation purposes. *Id. See also Cluff v. Nana-Marriott*, 892 P.2d 164, 171 (Alaska 1995) ("The circumstances surrounding the stress test are not sufficient to give rise to an implied employment contract. Even if [claimant] consented to act under [defendant's] control for the period of the test, neither party treated the test as an employment relationship [for workers' compensation purposes.]"); *CUST-O-FAB v. Bohon*, 876 P.2d 736, 738 (Okl.App. 1994) ("[W]e decline to extend [workers' compensation] coverage to claimants who sustain injury during the course of pre-employment skills testing[.]"); *Younger v. City and County of Denver*, 810 P.2d 647, 653 (Colo. 1991) ("[W]e find that there was no mutual agreement between the [defendant] and [claimant] sufficient to create an employer-employee relationship that would justify an award of workers' compensation benefits."); *BBC Brown Boveri v. Lusk*, 816 P.2d 1183, 1185 (Or.App. 1991) ("[C]laimant's only contact with [defendant] was ... when he performed a welding test for a position as a boiler maker and participated in an orientation 'school.' Claimant failed the test and was not hired at that

time.... It follows that he was not a 'worker' and that [defendant] could not have been an employer [for workers' compensation purposes.]"); *Esters v. General Motors Corp*., 246 Cal.Rptr. 566, 570 (Cal.App. 2 Dist. 1988) ("We conclude that appellant did not enter into an employment relationship by submitting to a pre-employment physical.").

The majority opinion purports to cite to three cases from other jurisdictions which hold that "injuries sustained during requisite pre-employment tests [are] compensable[.]" None of the cases cited stand for such a proposition. In the first case cited by the majority opinion, *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705 (Tex. Civ. App. 1963), the plaintiff sued the employer for failing to inform her that the pre-employment examination revealed that she had tuberculosis. The trial court granted summary judgment to the employer on the basis that any duty owed by the employer to inform the plaintiff of the disease was a matter covered by workers' compensation. On appeal the "plaintiff" argued that workers' compensation law did not apply and that she should be allowed to sue the employer. The appellate court disagreed on the grounds that the plaintiff was hired on the day she took the physical examination, and that the test results from the physical examination did not come back until several weeks later, while she was an employee.

In the instant proceeding, the majority opinion took nondispositive dicta from *Lotspeich* to make it appear as though the plaintiff in that case had sustained a pre-employment injury and was seeking workers' compensation benefits. The truth is, the plaintiff did not want workers' compensation benefits--she wanted to sue the employer. It was the employer who argued successfully that workers' compensation

law applied because they hired the plaintiff on the day of the examination and they learned of her disease several weeks after she was employed.

The other two cases cited by the majority opinion are equally contrary to the majority opinion. In both cases cited by the majority opinion, *Smith v. Venezian Lamp Co.*, 168 N.Y.S.2d 764 (N.Y. App. Div. 1957) and *Laeng v. Workmen's Comp. Appeals Bd.*, 494 P.2d 1 (Cal. 1972), the claimants were "trying out" for employment. *Smith* and *Laeng* both held that "tryout" work is sufficient to permit workers' compensation laws to be invoked because the claimants were engaged in activities that were the same as that which they would do if employed by the employers.

I am fundamentally dismayed by the majority opinion's distorted reliance on *Smith* and *Laeng* for two reasons. First, courts around the country have recognized that "tryout" work is not the same as engaging in a pre-employment physical examination. The reason courts around the country make such a distinction and apply different rules is because the overwhelming majority of employers in the country require routine medical proof of the basic healthiness of potential employees. Consequently, it would pose an undue economic burden to require employers to pay additional workers' compensation premiums to cover pre-employment physical examination injuries. On the other hand, the overwhelming majority of employers in the country do not require "tryout" work by potential employees. The distinct line of cases that follow *Smith* and *Laeng* seek to protect employers from "civil lawsuits" when potential employees suffer injury during "tryout" work by invoking workers compensation laws that preclude such civil lawsuits.

The second reason for my dismay with the majority opinion's reliance on *Smith* and *Laeng*, is that the majority opinion has disingenuously sought to apply those cases to the instant set of facts, when the state appellate courts which decided *Smith* and *Laeng* have refused to extend those cases to facts similar to the instant case. As to the *Smith* decision, New York appellate courts have refused to apply that decision to injuries resulting from pre-employment physical examinations. *See Rastaetter, supra.* As to the *Laeng* case, California appellate courts have refused to apply that decision to pre-employment physical examination injuries. *See Esters, supra.*

Finally, I believe the claimant did not prove by credible evidence that he suffered an injury on July 31, 1998. The majority opinion declares that the claimant's testimony "established" that he injured his back during the agility testing. "Establish" means "to put beyond doubt: prove." Webster's Collegiate Dictionary 397 (10th ed. 1993). The evidence conclusively shows that the claimant did not report an injury to the human resources personnel assistant at the time he allegedly hurt his back; neither did he report an injury to anybody else at the company; neither did he report an injury to Dr. Viradia when he was examined on the very day he was allegedly injured; and Dr. Viradia found no injury during the examination.

Almost a month passed before evidence surfaced that the claimant allegedly suffered a back injury during the pre-employment testing. The claimant filed a claim for benefits on August 25, 1998. Dr. Wardlow concluded the claimant injured his back as a result of pre-employment strength testing. How would the doctor know? The claimant told him. Similarly, Dr. Landis concluded the claimant injured his back with an onset date of July 31, 1998. How would the doctor know? The claimant told him. I agree

with the WCAB that this evidence is "totally subjective, biased, [and] self-serving[.]" This "proves" only that the claimant told the doctors he suffered a back injury on July 31, 1998 and that he exhibited symptoms on the day he was examined. On August 24, 1998, Dr. Viradia again examined the claimant and found tenderness and muscle spasm in the claimant's lower back. A reasonable person would find this "proves" the claimant suffered a back injury at some time between July 31, 1998 and August 24, 1998.

The majority admits this is the first time the West Virginia's Worker's Compensation system has faced this problem. Potential employers had better be alerted that it is almost assuredly not the last time. I believe this injury is a health insurance problem, not a worker's compensation problem. Worker's compensation was not intended to be an insurance program or a retirement program. For the foregoing reasons, I would affirm the WCAB's decision.

Accordingly, I respectfully dissent. I am authorized to state that Justice Davis joins me in this dissent.