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Workmen's Compensation

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have been more liberal with respect to the rights of adopted children. There is a trend toward recognition of equal status for natural born and adoptive children in all respects.[41]

The result in the instant case may have been just as between the parties, but the court's analysis introduces confusion into this area of law in Washington. A decision based upon the testator's intent rule of construction offers no general rule applicable to similar future cases. Predictability is impossible with this approach. Any guess as to what was in the testator's mind fifty or sixty years ago is as good as another. The probabilities are great that the testator did not contemplate the possibility of adoption in the first place, or his intention one way or another would have been expressed. By declaring adoption statutes to be of no effect in determining testate succession, the status of hundreds of adopted children in the state of Washington has been cast into doubt. If they have not been specifically provided for in wills, they may be judicially disinherited in the future should the approach in this case be followed. It is submitted that the reason for the acceptance by the court of the testator's intent approach, and the ensuing result of the case, is to be found in the court's reluctance to sanction power in the hands of the life tenant to divest the rights of the remaindermen through use of adoption proceedings. Whether the approach of this decision will be followed in a situation where this question is not present or where the adopted child is a stranger to the testator is an open question.

There should be no distinction between testate and intestate succession under the terms of the adoption statute. This is the view of the Washington legislature as evidenced by the present statute,[42] prior statutes[43] and the most recent cases in other jurisdictions.[44]

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WORKMEN'S COMPENSATION

Workmen's Compensation—Employees for Short Term Are Covered by Act. In *Wilkie v. Department of Labor & Indus.*,[1] the Washington Supreme Court directly ruled, as it has so often in the past

[41] *In re* Heard's Estate, 49 Cal.2d 514, 319 P.2d 637 (1957); *In re* Stanford's Estate, 49 Cal.2d 120, 315 P.2d 681 (1957); *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958).

[42] See note 2 *supra*.

[43] See notes 2, 10 *supra*.

[44] See note 41 *supra*.

[1] 53 Wn.2d 371, 334 P.2d 181 (1959).

intimated,[2] that under the Washington Workmen's Compensation Act[3] there is no such classification as "casual workmen."

A Mr. Ernst was operating an extrahazardous business, logging, by himself without any employees. His logging tractor "lost" a track, and he enlisted the assistance of his neighbor, the claimant, to help repair the tractor. During the course of repair the heavy track slipped and fell upon the claimant, seriously injuring him. The Department of Labor and Industries rejected his claim for compensation. On appeal to the superior court, the jury found an implied contract of employment at the rate of $2.00 per hour. The wage rate was determined on the basis of local custom, and the employment contract was inferred from several facts, chiefly the control of Mr. Ernst over the claimant. The superior court gave judgment, notwithstanding the verdict, in favor of the Department; on appeal the supreme court reinstated the jury verdict.

The entire employment of the claimant at the time he was injured was less than half a day, although there had been a similar brief period of employment between the claimant and Mr. Ernst some months previously. The major part of the court's opinion, as well as the briefs of the parties, dealt with procedural points. The court, however, did note:

> It could well be . . . that these incidental employment contracts were not intended by the legislature to come within the purview of the act. However, we find no minimum employment exclusionary provision expressed in the act, and, if such was intended by the legislature, it is a matter for specific legislative enactment.[4]

The decision was en banc, with but one dissent. The dissenting opinion was very brief, but indicates for the future an area which should be fruitful of controversies over so-called "casual employees." In view of this conclusion, the dissent is quoted *in toto*:

> I agree that *Ernst was a logger,* and that he *employed Wilkie* to repair his tractor. *I do not agree that a logger's tailor,* doctor, cook, *or repairman are engaged in the extrahazardous employment of logging.*[5] [Emphasis added.]

The majority is quite consistent in following the previous cases under the act. A claimant's proof must show that he is a workman under the

[2] See, *e.g.,* Carsten v. Department of Labor & Indus., 172 Wash. 51, 19 P.2d 133 (1933).
[3] RCW Title 51.
[4] 53 Wn.2d 371, 376, 334 P.2d 181, 185 (1959).
[5] *Id.* at 377, 334 P.2d at 185.

act;[6] this requires a showing that he was employed[7] by a party defined in the act as an employer engaged in an extrahazardous trade or business,[8] and that he was injured in the course of his employment.[9] In the instant case there was no question but that Ernst was an employer engaged in an extrahazardous business since Washington, unlike the majority of states,[10] has no minimum number of employees qualification.[11] Also, there was no question but that the claimant was employed by Ernst; both the majority and the dissent agreed upon this, the court following its long established rule[12] that the contract of employment can be established by the "conduct of the parties and the surrounding facts and circumstances."[13] Finally, there was here no question but that the claimant at the time he was injured was engaged in doing precisely the thing he was hired to do. Consequently he was injured in the course of his employment.

It is believed that the dissent does not evidence any disagreement with the majority opinion as to what constitutes the test to determine employment covered under the act, but only that the dissenting judge thought the facts did not show employment in the employer's trade or business. That is, the majority thought the repair work undertaken was done in the ordinary course of Ernst's business, while the dissent felt it was not in the ordinary course of the business. If this interpretation is correct, the test for coverage in Washington, excepting the absence of the minimum-number-of-employees requirement so often found elsewhere,[14] is much the same as pertains in most of the states in the United States. The generally accepted rule is: even if employment is "casual" in the sense of being unpredictable and brief in nature, it is still not excluded from workman's compensation coverage unless it is also something outside the usual business of the employer.[15]

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[6] Clausen v. Department of Labor & Indus., 15 Wn.2d 62, 129 P.2d 777 (1942); Johnson v. Department of Labor & Indus., 182 Wash. 351, 47 P.2d 6 (1935); Degrugillier v. Department of Labor & Indus., 166 Wash. 579, 7 P.2d 616 (1932).

[7] Clausen v. Department of Labor & Indus., 15 Wn.2d 62, 129 P.2d 777 (1942); Johnson v. Department of Labor & Indus., 182 Wash. 351, 47 P.2d 6 (1935).

[8] Craine v. Department of Labor & Indus., 19 Wn.2d 75, 141 P.2d 129 (1943); Berry v. Department of Labor & Indus., 11 Wn.2d 154, 118 P.2d 785 (1941); Johnson v. Department of Labor & Indus., 182 Wash. 351, 47 P.2d 6 (1935); Carsten v. Department of Labor & Indus., 172 Wash. 51, 19 P.2d 133 (1933).

[9] Bridges v. Department of Labor & Indus., 46 Wn.2d 398, 281 P.2d 992 (1955); D'Amico v. Conguista, 24 Wn.2d 674, 167 P.2d 157 (1946); Degrugillier v. Department of Labor & Indus., 166 Wash. 579, 7 P.2d 616 (1932).

[10] 1 LARSON, WORKMEN'S COMPENSATION LAW § 52 (1952).

[11] RCW 51.08.070.

[12] Clausen v. Department of Labor & Indus., 15 Wn.2d 62, 129 P.2d 777 (1942).

[13] 53 Wn.2d 371, 375, 334 P.2d 181, 184 (1959).

[14] 1 LARSON, WORKMEN'S COMPENSATION LAW § 52 (1952).

[15] *Id.* § 51.

The dissent was not well taken if the judge was in fact applying the test just suggested. Clearly, Ernst considered it part of his business to undertake field repair of his equipment, since he retained the claimant as an assistant for that sole purpose, directing the claimant as to just what he should do. It is submitted that this is the usual or customary means of repair envisaged by small or "wildcat" loggers. None of them feel that during such repair they have temporarily taken up the business of repairing heavy equipment, but only that it is a necessary part of the logging business that they undertake to make such repairs to their equipment as they can, in order to decrease "downtime" and facilitate the actual cutting, snaking out, and hauling of logs.

Although the writer believes the dissent was mistaken in the application of the test for employment in the ordinary course of business, still the dissent has value. The value of the dissent lies in its emphasis of the requirement that an injury to be compensable under the act must be incurred by an employee while working for an employer *who at that time* is covered by the act.[16] In Washington, even though the work actually being done qualifies as extrahazardous, an injury received therein is *not* compensable under the act *unless* the employer is, for the purposes of the employment, regularly engaged in an extrahazardous business.[17]

The decision is important for two reasons. First, the court specifically recognizes that there is no "casual employee" under the Washington Workmen's Compensation Act as it presently reads. Second, in the court's emphasis on the contract of employment, it leaves unchanged the status of a mere volunteer who is not employed under any contract but merely gives assistance in doing a job that is in itself extrahazardous.[18] Even though a volunteer rightly expects remuneration for his efforts, it does not constitute employment under the statute.[19] Similarly, if an employee does an act not required by his employment, though done in his employer's interest (barring an emergency),[20] he is regarded as a volunteer and does not come within employment under the statute.[21]

There is an aspect of the case which may prove troublesome: what

[16] Berry v. Department of Labor & Indus., 11 Wn.2d 154, 118 P.2d 785 (1941).
[17] Craine v. Department of Labor & Indus., 19 Wn.2d 75, 141 P.2d 129 (1943); Johnson v. Department of Labor & Indus., 182 Wash. 351, 47 P.2d 6 (1935).
[18] Kirk v. Department of Labor & Indus., 192 Wash. 671, 74 P.2d 227 (1937).
[19] *Ibid.*
[20] Degrugillier v. Department of Labor & Indus., 166 Wash. 579, 7 P.2d 616 (1932).
[21] Muck v. Snohomish County P.U.D., 41 Wn.2d 81, 247 P.2d 233 (1952); Degrugillier v. Department of Labor & Indus., 166 Wash. 579, 7 P.2d 616 (1932).

effect will the decision have on the administrative enforcement of the act? The case puts a greater burden on the employer who comes under the act, for if he does not furnish the requisite information about all employees to the Department and pay the required premiums,[22] he is subject to penalties to be sued for in the name of the state.[23] In the case of a new business or resumed operation, the penalty may be $500. If an accident has been sustained by an employee prior to the time the Department has received such an employer's report, an additional penalty equal to fifty per cent of the cost of the resulting claim to the accident and/or medical aid fund is imposed.[24] Going concern employers who fail to keep proper records of their employees or to make the required reports to the Department are subject to a $100 fine for each such offense.[25] Presumably this burden of complying with reporting provisions is solely that of employers and is not on the Department. These reporting provisions may be a pitfall for the unwary employer who desires to comply with the act but feels such short-term employments are not worthy of bothersome reporting.

However, the collection of premiums is the burden of the Department, which it often must undertake even in the absence of any injuries.[26] The court in *Carsten v. Department of Labor & Indus.* expressly recognized the problem of collecting premiums. It said:

> The collection of premiums or assessments is a vital necessity, which comes first. If every householder is liable for such premiums covering every odd job of an hour's duration, or even for a job covering several days' time of a workman in building a chicken house, a cheap garage, or other structure on his property, the state-wide effort required to collect such premiums will be out of all proportion to the sums involved, and the result will be that the state will expend at least two dollars for every dollar thus collected for the compensation fund.[27]

The problem of premium collections in that case (going to the inclusion or exclusion of an employer from the act because he incidentally has work, extrahazardous in nature, done on his property) is far different from that presented by the *Wilkie* case. An employer engaged in an extrahazardous business, as was Mr. Ernst, must submit a report when he goes into business and quarterly reports thereafter as to the number

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[22] RCW 51.16.061 and 51.16.110.
[23] RCW 51.48.090.
[24] RCW 51.48.010.
[25] RCW 51.48.030.
[26] RCW 51.16.150.
[27] 172 Wash. 51, 53, 19 P.2d 133, 134 (1933).

of employees doing extrahazardous work.[28] This being so, the burden on the Department does not seem to be unduly increased, although in some instances it may mean the handling of very small sums.

In conclusion, the writer believes the decision is consistent with previous Washington cases decided under the act. On principle the decision is also correct, since the purpose of the act is to protect employees engaged in extrahazardous employment. The courts should not allow the purpose of the act to be evaded, and the *Wilkie* decision shows that it cannot be evaded by an employer who would hire workmen for short but successive periods. The decision also places Washington in line with the majority of states in that, even though employment be brief and unpredictable in occurrence, if it is part of the employer's normal business it is employment covered by Workmen's Compensation.

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[28] RCW 51.16.060 and 51.16.110.