FILED
AUG 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

550

VANCE TRIVELY,

Plaintiff-Appellee,

vs.

GENE BELKNAP,

Defendant-Appellant.

Filed August 26, 1980

0-177
2-64115

Appeal from Page District Court - Keith E. Burgett, Judge.

Defendant appeals from trial court judgment for plaintiff in an action for damages for injuries sustained by plaintiff as a result of a fall from the roof of defendant's house. REVERSED AND REMANDED.

John D. Sens of Stuart, Tinley, Peters, Thorn, Smits & Sens, Council Bluffs, Iowa, for defendant-appellant.

Gregory G. Barnsten and Curtis Hewett of Smith, Peterson, Beckman & Willson, Council Bluffs, Iowa, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

The defendant appeals from the trial court judgment for plaintiff in an action for damages for injuries sustained by plaintiff as a result of a fall from the roof of defendant's house. The defendant claims that the trial court erred in not dismissing the action for lack of subject matter jurisdiction where the action, as ultimately submitted to the jury, involved a claim by plaintiff that he was an employee of the defendant. Defendant also claims that the trial court committed error in the instructions to the jury defining the employer-employee relationship.

I. We first consider defendant's contention that plaintiff's claim, as ultimately submitted to the jury, was so predicated on an employer-employee relationship as to render it exclusively within the jurisdiction of the industrial commissioner. In deciding this issue we must reject plaintiff's attempt to defeat this claim as untimely. If defendant's contention on this point is valid, it goes to subject matter jurisdiction of the court and may be raised at any time. Steffans v. Proehl, 171 N.W.2d 297, 300 (Iowa 1969). On the merits, we conclude it is abundantly clear that at some time prior to submission of this case to the jury, the plaintiff became "locked in" on the theory that he was defendant's employee. The theories of liability submitted to the jury in the trial court's instruction number three (these being the only theories of liability submitted) are predicated on that relationship.[1] Based upon this circumstance, we must conclude that the claim was one falling within the exclusive jurisdiction of the industrial commissioner unless, as plaintiff now urges, the employment relationship was "purely casual" and thus outside the relationship governed by the workers' compensation laws. See § 85.1(2), The Code; Tepesch v. Johnson, 230 Iowa 37, 40, 296 N.W. 740, 742 (1941).

"Casual employment" has been defined as follows: "Employment is 'casual' when it is irregular, unpredictable, sporadic, and brief in nature. Under most statutes, even if casual, it is not exempt unless it is also outside the usual business of the employer." 1C Larson, Workmen's Compensation Law § 51.00 (1980). This is true in Iowa. Section 85.1(2), The Code; Tepesch v. Johnson, 230 Iowa 37, 40, 296 N.W. 740, 742 (1941). Larson further explains at section 51.12:

> In filling out the bare bones of the "casual employment" concept, the courts have laid the principal stress on the irregular, unpredictable, sporadic and brief nature of

[1] We believe that it is without significance that the language of the trial court's instructions was couched in terms of the relationship of master and servant rather than instructing upon the relationship of employer and employee. For purposes of the issues in the present dispute, we can see no distinction between the two relationships.

> the work. For example, the job of cleaning up streets after a hurricane is the sort of thing that no one could confidently rely on as a regular source of income. On the other hand, the making of necessary repairs on a manufacturing plant by a structural steel worker does not become casual merely because the damage being repaired had been caused by a hurricane. * * * It should be noted that the test usually applied is whether the employment is casual—not whether this employee's relation to the employment is casual or brief." (emphasis in original - footnotes omitted).

A number of cases present situations similar to the case at bar, i.e. plaintiff injured while helping to repair defendant's private residence where the repair work had nothing to do with defendant's trade or business. (Defendant here admitted that plaintiff's injury was not sustained while working at defendant's trade or business. App. 37-38.) See Stephens v. Industrial Commission, 26 Ariz. App. 192, 547 P.2d 44 (1976) (plaintiff-carpenter injured while working on construction of owner's private residence was not an "employee" for workmen's compensation purposes where the owner was not engaged in the construction business) and Craft v. Owens, 359 So.2d 390 (Ala. Civ. App. 1978) (carpenter was hired to aid in remodeling employer's private residence; such employment was casual in nature and outside the scope of employer's normal business as hardware store proprietor). In Schuler v. Holmes, 242 Iowa 1303, 49 N.W.2d 818 (1951), the court found "purely casual" employment where plaintiff was injured while working on his employer's premises to remodel the house for part-home, part-rental use. Plaintiff worked on an hourly basis with no definite agreement on an hourly wage. If the relationship between plaintiff and defendant constitutes casual employment, then we believe the obligations owed by defendant to his employee would be such as have been recognized and developed in the agricultural labor cases during the time that that type of employment was also not subject to the workers' compensation laws. See, e.g., Brandt v. Richter, 159 N.W.2d 471 (Iowa 1968); Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (1965).

Based on the foregoing discussion, we believe that the issue before the court on the matter of casual employment is one of fact—on the record the trier of fact might have concluded that plaintiff's employment was casual, but it was not required to do so. This characterization of the issue presents some difficulty because we are unable to find that the trier of fact in the present case ever resolved the matter. Because a new trial is being ordered on other grounds discussed in division II of this decision, this deficiency may be cured in the subsequent proceedings which take place.

Incident to resolving the issue of casual employment on remand, we expressly reject defendant's contention that such issues must always be resolved in the first instance before the industrial commissioner. We believe plaintiff may proceed at his peril to make such claims directly in the district court.

II. We next consider defendant's claim that the instructions of the trial court relating to the elements required for an employer-employee relationship were defective in that they include only some elements and exclude others. This objection was timely made in the trial court and is before us for review. The factors to be considered in determining whether an employer-employee relationship exists are set forth in Usgaard v. Silvercrest Golf Club, 256 Iowa 453, 455-56, 127 N.W.2d 636, 638 (1964); Hjerlerd v. State, 229 Iowa 818, 826, 295 N.W. 139, 143 (1940). These are: (1) the right of selection, or to employ at will; (2) the responsibility for payment of wages by the employer; (3) the right to discharge or terminate the employment by the employer; (4) the right to control the work; (5) that the party sought to be held as employer is the responsible authority in charge of the work or for whose benefit the work is performed; and (6) that the intention of the parties is made to appear with respect to the creation of the relationship of employer and employee.

In the trial court's instructions, only the second and fourth factors above are discussed. Because defendant asked that the other elements of the employer-employee relationship be instructed upon, and particularly, that the sixth factor listed above, which we consider to be very much at issue in the present controversy, be instructed upon, we conclude it was error not to do so. As a result, a new trial is warranted.

REVERSED AND REMANDED.