Louisiana Law Review

Volume 9 | Number 4
May 1949

Workmen's Compensation - Liability to Employees of Intermediary in Lumbering Cases

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traffic. This decision is eminently sound. Allowing recovery in such an instance would create a serious administrative problem and result in virtual abolition of the distinction between hazardous and non-hazardous businesses.

The principal case can be readily distinguished from the *Reagor* decision. Here the presence of the customers' motor vehicles was invited by the employer and was vital to the continued successful operation of his business, as he was without means to transport his product to customers. Therefore the employee was required as a part of his regular duties to work in close proximity to motor vehicles essential to the employer's business.

It is submitted that the court in the instant case might have reached a contrary conclusion without fear of administrative difficulties by viewing the employer as having made the motor vehicles of the customers an integral part of his regular business. Such a conclusion would be in accord with the policy of liberality found in both the decisions and the act itself.

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WORKMEN'S COMPENSATION—LIABILITY TO EMPLOYEES OF INTERMEDIARY IN LUMBERING CASES—Suit was brought against the insurer of the Gross and Janes Tie Company to recover compensation for injuries received by the plaintiff in the course of his employment at a tie mill owned by McAllister. The tie company negotiated with a third party landowner for the purchase of timber for which the landowner was to be paid twenty cents for each tie cut. The company then engaged McAllister to move his tractor-type tie mill onto the land and cut the ties. He was paid the market price less twenty cents per tie retained by the company and remitted to the landowner.[1] *Held*, that no relationship of principal and contractor existed between the company and the employer of the plaintiff; that the company was a purchaser of manufactured ties, therefore, the plaintiff was not entitled to recover compensation from the company under Section 6 of the Workmen's Compensation Act.[2] *Grant v. Consolidated Underwriters*, 33 So.(2d) 575 (La. App. 1947).

1. Also deducted from the price paid to McAllister, but not material to the purpose of this discussion, was twenty cents per tie which the company retained and applied to a debt owed to the company by McAllister evidenced by a chattel mortgage on the tie mill; and twelve to fourteen cents per tie retained and paid to the landowner for services rendered in hauling the ties after they were cut.

2. Louisiana Workmen's Compensation Law, La. Act 20 of 1914, as amended, § 6 [Dart's Stats. (1939) § 4396].

A purchaser is not liable under Section 6 of the act to the employee of his seller.[3] The problem is thus presented in cases arising under this section of determining whether the defendant occupies the status of a principal or a purchaser. The question has most frequently arisen in cases involving lumbering transactions[4] where the owner of timber agrees to sell to a middleman who cuts the timber and resells it to the lumber company. These sale and resale agreements are negotiated either by this middleman or the lumber company. The courts have consistently held under such circumstances that the relationship between the lumber company and the middleman is that of vendor-vendee and, consequently, have denied recovery to the injured employee of the middleman.[5] In these decisions the courts have seized upon the fact that title to the timber had vested in the middleman prior to the time that he delivered it to the lumber company in order to find that he was a vendor rather than a contractor.[6] The same result has been reached even though the middleman was operating under an exclusive resale agreement with the defendant,[7] or the original purchase from the landowner was

3. An employee must prove the existence of the relationship of contractor and principal between his immediate employer and the defendant to establish the defendant's liability under Section 6. See Langley v. Widow and Heirs of MacDonald, 7 La. App. 715 (1927); Morrison v. Weber-King Mfg. Co., 6 La. App. 388 (1927); West v. Martin Lumber Co., 7 La. App. 366 (1927); Jones v. Pan American Petroleum Corp., 190 So. 204 (La. App. 1939); Wilson v. Roberts, 194 So. 88 (La. App. 1940); Reed v. J. W. Jeffries Lumber Co., 9 So.(2d) 87 (La. App. 1942); Brown v. City of Shreveport, 15 So.(2d) 234 (La. App. 1943).

4. Twenty-four out of a total of twenty-seven reported cases dealing with this problem relate to lumbering transactions.

5. See, for example, Eaves v. Hillyer-Edwards-Fuller, Inc., 139 So. 510 (La. App. 1932); Brasher v. Industrial Lumber Co., 165 So. 524 (La. App. 1936); Vincent v. Industrial Lumber Co., 199 So. 593 (La. App. 1941).

6. Reed v. J. W. Jeffries Lumber Co., 9 So.(2d) 87 (La. App. 1942), is the only prior cases where the middleman was found to be a vendor although title to the timber did not vest in him before his "sale" to the lumber company. The landowner refused to sell to the middleman on credit, but agreed to sell to the lumber company; therefore the company paid cash to the owner and was named in the deed as purchaser of the timber. Even so, the court found that, not the company, but the middleman had purchased from the owner. It relied upon the following facts to reach such a conclusion; the purchase price was charged against the account of the middleman on the books of the company; interest and carrying charges on that amount plus severance taxes due to the state were charged against the middleman's account; and the middleman, himself, testified that the company had at no time owned the timber. This case illustrates the extent to which the court has gone to find a vendor-vendee relationship between the defendant and the middleman. It would seem that if the decision can be justified, certainly it cannot be extended beyond the particular facts of the case.

7. Hatch v. Industrial Lumber Company, 199 So. 587 (La. App. 1941); Perkins v. Hillyer Deutsch Edwards, Inc., 199 So. 590 (La. App. 1941).

made solely on the credit of the defendant.[8] Although granting immunity to the lumber company in these cases clearly invites circumvention of Section 6,[9] in only one case[10] has the employee been allowed to recover.

It is believed that the court erred in the present case in concluding that a vendor-vendee relationship existed between the tie company and the middleman. This case is distinguishable from the prior cases in that, here, there was no evidence whatever to sustain a finding that McAllister at any time became owner of the timber or that it was ever intended that he should become the owner. Obviously, McAllister could not have sold something which he did not own to the company.[11] Additional support for this conclusion may be found from the fact that, ap-

9. The purpose of Section 6 is to prevent a party who receives the actual benefit of the services rendered by the injured employee from making himself immune from liability by interposing an independent contractor between himself and the employee. Since the contractor so imposed is always insolvent, were it not for the protection provided by Section 6, the employee would be totally without remedy in such cases (See Mayer, Workmen's Compensation Law in Louisiana (1937) 35). With this in mind, the court has often stated that it would not hesitate to look beyond the surface of a sale and resale transaction, such as these cases involve, if the facts and circumstances justified a conclusion that the whole arrangement was a scheme concocted in a deliberate attempt to avoid liability. [See, for example, Hatch v. Industrial Lumber Co., 199 So. 587 (La. App. 1941); Perkins v. Hillyer Deutsch Edwards, Inc., 199 So. 590 (La. App. 1941); Reed v. J. W. Jeffries Lumber Co., 9 So.(2d) 87 (La. App. 1942).] In spite of such statements, a cursory reading of the opinions indicates that an employee must present evidence sufficient to exclude every other reasonable hypothesis before the court will find a deliberate attempt on the part of the defendant to avoid liability. Is this not contrary to the very spirit of the Workmen's Compensation Act and to the often announced policy of the supreme court to construe the provisions of the act liberally in favor of the employee? (In Byas v. Hotel Bentley, Inc., 157 La. 1030, 103 So. 303 (1925), for example, the supreme court said, "the court of appeal has given the statute a narrow and technical, rather than the liberal, construction intended and contemplated by the lawmaker, and as expressed in numerous decisions of this court.") It is submitted, that even in these lumbering cases where it can be shown that technically a vendor-vendee relationship has been established, the employee should not be denied recovery, when it is probable that such a scheme may exist, merely because he cannot prove beyond a reasonable doubt that the defendant is attempting to avoid liability. Such decisions are certainly invitations to unscrupulous employers to deprive the employee of his right to compensation. If the court is without authority to remedy this situation, then legislative action is certainly in order.

10. Carter v. Colfax Lumber and Creosoting Co., 121 So. 233 (La. App. 1928) (Middleman purchased timber from the landowner while acting as agent for defendant lumber company. The court placed considerable weight on the testimony of the middleman to the effect that he had been an employee of the defendant for several years and had never considered himself anything other than an employee).

11. Art. 2452, La. Civil Code of 1870, provides: "The sale of a thing belonging to another person is null . . . ."

8. Windham v. Newport Co., 143 So. 538 (La. App. 1932); Cannon v. Tremont Lumber Co., 188 So. 431 (La. App. 1939); Williams v. George, 15 So. (2d) 823 (La. App. 1943).

parently, the entire arrangement for the purchase of the timber from the landowner was the result of negotiations carried on exclusively by the company; that McAllister was neither present at the time nor was he aware that the agreement to purchase was contemplated until after it had been concluded; and that it was the company to whom the landowner was to look for payment. Unfortunately, the court did not see fit to devote any portion of its opinion to an explanation of how McAllister acquired ownership.[12]

It would appear that the result reached in the present case could more easily be justified on the ground that the work which was performed was not a part of the regular business of the Gross and Janes Tie Company.[13] Section 1, Subsection 2, of the Workmen's Compensation Act requires that an employee must show as a condition precedent to recovery that he was performing services "in the course of his employer's trade, business, or occupation." This same requirement has been made a part of Section 6 of the act.[14] Since there was uncontradicted evidence in the record to show that the tie company was not engaged in the business of manufacturing ties, but rather its business was confined to the purchase of manufactured ties, recovery could have been denied on this basis.

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CRIMINAL LAW AND PROCEDURE—RESPONSIVE VERDICTS—Under a bill of information charging defendant with the crime of aggravated arson, the jury returned a verdict of guilty of "simple arson in the sum of $150." *Held,* simple arson is not responsive to a charge of aggravated arson because it is not an included offense, as required by Article 386 of the Code of Criminal Procedure of 1928 as amended by Act 147 of 1942. Motion in arrest of judgment sustained. *State v. Murphy,* 38 So. (2d) 254 (La. 1948).

At the time of the trial, Act 161 of 1948 amending Article

12. The court did find that the original purchase agreement was not binding upon the tie company or the landowner and that therefore title to the ties did not vest in the company until they were cut and delivered by McAllister, but, as far as this writer can discover, it never did explain how it found that McAllister became owner of the ties prior to the time he delivered them to the company.

13. Instead the court said, "the sole issue before us is whether, on the basis of these facts, McAllister was in truth an employee or a contractor of Gross and Janes Company. If the facts justify such an answer, then, unquestionably, the defendant, as the insurance carrier of Gross and Janes, is clearly liable for compensation." 33 So.(2d) 575, 576.

14. Horrell v. Gulf and Valley Cotton Oil Company, Inc., 131 So. 709 (La. App. 1930); Wilson v. Roberts, 194 So. 88 (La. App. 1940).