Filed 2/5/13 Espinoza v. WCAB CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STEWART ESPINOZA, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and LOS ANGELES COUNTY JAIL, Respondents.	No. B239438 (W.C.A.B. No. ADJ6748204)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Affirmed.

Hitzke & Associates, Sean P. Handy, Daniel L. Hitzke, Robert D. Porter for Petitioner.

Fuller Jenkins, Kellie A. Wright, Craig Fuller for Respondent.

On January 17, 2012, the Workers' Compensation Appeals Board (WCAB) found that petitioner Stewart Espinoza, while an inmate of the Los Angeles County Men's Central Jail, was not an employee of the County of Los Angeles (County) at the time that he was injured while working as a cook in the jail, and that he was therefore not eligible for workers' compensation benefits. Espinoza filed a petition for review which we denied on May 17, 2012. The Supreme Court granted Espinoza's petition for review on August 29, 2012 and transferred the matter to this court with directions to vacate the order denying the petition for a writ of review. We issued a writ of review on September 20, 2012 pursuant to the Supreme Court's direction.

Having afforded the parties an opportunity to file briefs, and following oral argument, we conclude once again that the WCAB's decision should stand.

Whether Espinoza was County's employee depends in this case on whether he performed the work he was doing voluntarily or whether he was required to work as a condition of his incarceration. So formulated, the issue at hand is primarily a problem of proof. The solution to this problem was the enactment in 1970 by the Los Angeles County Board of Supervisors of an order, referred to hereafter as Order #91, which provides that persons confined in the county jail may be compelled to perform labor under the direction of a county official. Order #91 goes on to state that "[n]o prisoner engaged in labor pursuant to this order shall be considered as an employee of, or to be employed by the County or any department thereof, nor shall any such prisoner come within any of the provisions of the Workmen's Compensation Insurance and Safety Act of 1917 . . . ."

For the reasons set forth below, we conclude that Order #91 is proof of the fact that Espinoza was not performing work voluntarily but rather that, under Order #91, he was required to work as a condition of his incarceration.

Facts

Prior to the trial before the workers' compensation administrative law judge (WCJ), Espinoza and County stipulated that Espinoza was working as a cook in the county jail on November 1, 2005 when he sustained an injury to his left shoulder. The

parties also stipulated that if Espinoza was found to be County's employee, the injury arose in the course and scope of employment.[1] Thus, the only issue in the case is whether Espinoza was County's employee.[2]

Espinoza did not testify. Instead, there was an offer of proof that the WCJ rendered as follows: "He [Espinoza] thought his work was voluntary, and was never told his work was mandated by the terms of his incarceration. He received preferential treatment in exchange for the work."

Order #91

Order #91 was enacted by the Board of Supervisors in response to the decision in *State Compensation Ins. Fund v. Workmen's Comp. App. Bd.* (1970) 8 Cal.App.3d 978 (*Childs*). *Childs* was a case in which real party in interest David Childs, then an inmate in the Los Angeles County Jail, was working on a road project in Malibu in November 1966 when he was injured. Childs testified without objection or contradiction in the hearing before the WCJ that he volunteered for the job and was not required to work. (*Childs* at p. 981.) He was in fact being paid 50 cents an hour. (*Childs* at p. 979.) County contended that his work was not voluntary but that he was working as a result of County's "authority over his person" which flowed from Penal Code section 4017.[3] (*Childs* at p. 981.)

Childs conceded that if there were a County ordinance that required him to work, he would not be a volunteer. (*Childs* at p. 982.) The court concluded: "In the present case, in the absence of a county ordinance requiring inmates to perform such labor as incident to the incarceration it becomes necessary only to examine the relationship

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[1] Espinoza was treated for his injury and was eventually rated with a whole person impairment of four percent and an additional three percent for pain.

[2] The WCJ found favorably to Espinoza on the statute of limitations and this finding has not been challenged.

[3] Penal Code section 4017 provides in relevant part that persons confined in the county jail may be required by an order of the board of supervisors to perform labor on public works.

between the inmate and the county. We have already determined his work was voluntary. He performed a service in return for a gratuity . . . ." (*Childs* at p. 983.)

Order #91 was promulgated following the *Childs* decision. The prefatory letter to the Board of Supervisors refers to *Childs* and states that prior to this decision, jail inmates were not considered employees entitled to workers' compensation benefits. Order #91 states in relevant part that persons confined in the county jail "may" be compelled to perform labor under the direction of a county official and it goes on to state that "[n]o prisoner engaged in labor pursuant to this order shall be considered as an employee of, or to be employed by the County or any department thereof, nor shall any such prisoner come within any of the provisions of the Workmen's Compensation Insurance and Safety Act of 1917 . . . ."

Procedural History

As noted, the issue before the WCJ was limited to whether Espinoza was County's employee.

The WCJ reasoned that Order #91 only provides that a jail inmate "may" be compelled to work, not that the inmates "shall" be compelled to work. The WCJ went on to conclude that there was no evidence that Espinoza was compelled to work. "He [Espinoza] did the work in order to receive some extra benefits while in jail. Nothing indicates the terms of his sentence required him to work in the kitchen."

The WCAB disagreed. Noting that it was *Childs* that spawned Order #91, the WCAB pointed out that similar ordinances have been held to exclude county jail inmates from workers' compensation coverage. The WCAB cited as an example the Tulare county ordinance in *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629 (*Parsons*). The WCAB's conclusion was that an inmate's work "is not voluntary if it is performed subject to a County ordinance that requires an inmate to work while incarcerated."

Parsons was a case where the defendant was given a choice at sentencing between a routine jail sentence or being placed on probation with the condition he serve 45 days at an industrial road camp. (*Parsons* at p. 639.) Having opted for the latter, when he

showed up on the first day at the road camp (where he was eventually injured), he was told to work in the kitchen; he was not paid and did not receive any work-time credits. (*Parsons* at p. 632.) The *Parsons* court concluded on the issue of the effect of the county ordinance: "Tulare County ordinances and resolutions enacted pursuant to Penal Code section 4017 require county jail and correctional road camp inmates to work. This statutory compulsion to work further negates any consensual employment relationship under the facts of this case. The question of whether there was a 'voluntary' consensual relationship turned in *Childs* on the fact Los Angeles County inmates were not required to work by ordinance (8 Cal.App.3d at p. 983)." (*Parsons* at p. 639.)

In sum, the WCAB appears to have concluded, principally on the strength of *Parsons*, that the existence of an ordinance requiring jail inmates to work, standing alone, warranted the conclusion that the inmate's work is not voluntary. The WCAB rejected the theory that the word "may" in Order #91 made the inmates' work voluntary: "If an inmate is directed to work by the Sheriff, the work is necessarily not voluntary." (Underlining in original.)

Discussion

"The traditional features of an employment contract are (1) consent of the parties, (2) consideration for the services rendered, and (3) control by the employer over the employee. [Citation.] Although these common law contract requirements are not to be rigidly applied, a consensual relationship between the worker and his alleged employer nevertheless is an indispensable prerequisite to the existence of an employment contract under Labor Code section 3351."[4] (*Parsons,* 126 Cal.App.3d at p. 638.)

Whether a person incarcerated in a county jail is in a consensual employment relationship depends on the policy that the county has chosen to follow. "The trial court

[4] Labor Code section 3351 defines an employee as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . ." Broadly put, persons "incarcerated in a state penal or correctional institution while engaged in assigned work or employment" are "employees" under subdivision (e) of section 3351. The legislative policy is that persons confined, at least those in state institutions, should be treated as employees if they work.

must determine whether a county inmate was an 'employee' on a case-by-case basis using the general definition of employee. (See generally, *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629, 636, fn. 3 [].) In making this decision the trial court should consider the following questions, inter alia: (1) Did the county require plaintiff to work as a condition of incarceration?; (2) Did plaintiff volunteer for the assignment?; and (3) What considerations were received, if any, for example, monetary compensation, work-time credits, freedom from incarceration, etc.?" (*Rowland v. County of Sonoma* (1990) 220 Cal.App.3d 331, 334.)

If the first of these questions is answered in the affirmative, the inquiry is at an end. This is especially true of cases, such as the one before us, where the county has a declared policy, set forth in writing, that it requires jail inmates to work as a condition of their incarceration. If such a policy is in effect, inmates are simply not in a position to volunteer to work. It is to be kept in mind that the employment relationship is consensual, which means that the county must consent to the relationship. If it has a declared policy to the contrary, an employment relationship cannot exist.

Given that Order #91 precludes the establishment of an employment relationship, it is not necessary to address the question whether Espinoza volunteered to work. We note, however, the manifest difficulties that would be encountered if Order #91 did not exist. With an inmate population the size of the County's jail system, the problems of proving whether the County entered into an employment relationship with a given inmate would be practically insurmountable. It would also lead to the highly undesirable result of leaving some inmates in the workers' compensation system and some outside of it, leaving the public agency with a completely unpredictable financial exposure.

We conclude that the WCAB decision is correct and that Order #91 precluded the creation of an employment relationship.

Disposition

The decision of the Workers' Compensation Appeals Board is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.