Booth, Sylvia

EMPLOYER-EMPLOYEE (RCW 51.08.070; RCW 51.08.180)

Choreworkers

A worker who provided in-home child care to her sister's children was approved as a DSHS provider. Because the worker consented to the employment and reasonably believed she worked for DSHS, the Board concluded that she was employed by DSHS and not by the father of the children. *Citing Jackson v. Harvey*, 72 Wn. App. 507 (1994) *review denied*, 124 Wn.2d 1003 (1994). **….*In re Sylvia Booth*, BIIA Dec., 92 6148 (1995)** [dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SYLVIA J. BOOTH	)	**DOCKET NO. 92 6148**
	)	
CLAIM NO. N-575004	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Sylvia J. Booth, by
Walthew, Warner, Costello, Thompson & Eagan, P.S., per
Kathleen M. Keenan, Thomas A. Thompson, and Timothy B. McGarry

Employer, Department of Social and Health Services, by
The Office of the Attorney General, per
Dana Reid, Robert L. Schroeter, and David R. Minikel, Assistants

Department of Labor and Industries, by
The Office of the Attorney General, per
Amanda J. Goss, and Lynn D.W. Hendrickson, Assistants

Douglas Thorson, Pro Se

This is an appeal filed by the employer, the Department of Social and Health Services (DSHS), on December 21, 1992, from an order of the Department of Labor and Industries dated December 15, 1992, which determined that Sylvia J. Booth was an employee of the Department of Social and Health Services on October 8, 1992, the date of the industrial injury. **AFFIRMED.**

PROCEDURAL AND EVIDENTIARY MATTERS

The Board has reviewed the evidentiary rulings in the record of proceedings. The industrial appeals judge sustained the claimant's objection to questions regarding the claimant's prior felony theft conviction. The industrial appeals judge allowed an offer of proof in colloquy regarding Ms. Booth's prior conviction. We believe Evidence Rule 609(a)(2) allows such questioning for the purposes of impeaching Ms. Booth's credibility. State v. Ray, 116 Wn.2d 531 (1991). We, therefore, overrule Ms. Booth's objection and allow the questions and answers regarding Ms. Booth's prior theft conviction beginning on page 38 of the March 22, 1994 transcript at line 16, through page 39, line 11. However, we will not admit Exhibit 6, the certified copy of the judgment and sentence, since the conviction was elicited from the witness on cross examination. The Board finds that no other prejudicial errors were committed and all other evidentiary rulings are hereby affirmed.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on June 23, 1994, in which the order of the Department dated December 15, 1992, was reversed and the matter remanded to the Department of Labor and Industries to take such further action as is authorized by law.

The issue presented in this appeal is whether Sylvia J. Booth was acting in the course of her employment with the Department of Social and Health Services (DSHS) at the time of injury on October 8, 1992.

Sylvia J. Booth is a 49-year old woman who was injured while providing in-home child care. Douglas Thorson, Ms. Booth's nephew, is the legal custodian of six children. Ms. Booth was providing care for these children at the time of her injury. The children are the grandchildren of Ms. Booth's sister. Ms. Booth was caring for the children, assisting her sister, just prior to her sister's death. Shortly after her sister's death, a DSHS caseworker came to the home and discussed the care of the children with Ms. Booth. These discussions eventually led to Ms. Booth's approval as an in-home child care provider through DSHS.

Ms. Booth and the Department of Labor and Industries believe Ms. Booth was an employee of DSHS at the time of her injury on October 8, 1992. DSHS contends that it is not the employer and that Ms. Booth worked for Douglas Thorson at the time of her injury.

The industrial appeals judge relied on Novenson v. Spokane Culvert, 91 Wn.2d 550 (1979), In re Beryl June Davis, BIIA Dec., 90 3688 (1992), and In re Elizabeth A. Amell, Dckt. No. 89 2974 (August 16, 1991), in determining that no employment relationship existed between Ms. Booth and DSHS. The industrial appeals judge believed that there was little evidence to support any control by DSHS over Ms. Booth's work as an in-home child care provider.

Since we issued our decisions in Davis, and Amell, Division 1 in the Court of Appeals decided the case of Jackson v. Harvey, 72 Wash. App. 507 (1994) Rev. Denied 124 Wn.2d 1003 (1994). We have granted review because we believe when the rationale set forth in Jackson v. Harvey is applied to the facts involving Ms. Booth and her relationship with DSHS, Ms. Booth would be an employee of DSHS at the time of her industrial injury.

In our two prior decisions, In re Beryl June Davis, and In re Elizabeth A. Amell, we determined that the workers were not employees of DSHS. In Davis, we addressed the relationship of DSHS to

chore service workers. In Amell, the claimant was alleging an employment relationship with DSHS as a day care provider. In both Davis and Amell, we focused on the employer's right of control in determining when the employer/employee relationship existed. In doing so, we relied on Novenson v. Spokane Culvert, 91 Wn.2d 550 (1979). In Novenson, the court set forth the test for determining the existence of an employment relationship in industrial insurance cases. Novenson set forth a two-prong test: 1) the employer must have the right to control the worker; and 2) the employee must consent to the employment relationship. In Davis and Amell, we focused on the facts which showed control by the employer over the worker. Our reading of the Court of Appeals decision in Jackson v. Harvey, however, requires more careful attention to the consent prong of the Novenson test.

In Jackson v. Harvey, Jackson, a carpenter, was injured while working on a remodel project in a private home. He had been contacted by a contractor, Harvey, to assist in the remodel project. Harvey had been hired by the homeowners, the Cotterills, to do the remodeling. Harvey requested Jackson to assist in the remodel project because Harvey was behind in the project and needed additional help. However, the arrangement between the Cotterills and Harvey was that the individuals that Harvey found to assist in the remodel project would be employees of the Cotterills and would be paid directly by the Cotterills.

Although Jackson spoke with the Cotterills and was acquainted with the Cotterills prior to beginning work on the home, there was no discussion between the Cotterills and Jackson regarding the nature of the employment relationship. Jackson assumed he was working for Harvey. Jackson was injured on his second day of work on the Cotterills' home.

If Jackson was an employee of Harvey, he would be entitled to industrial insurance coverage. If, on the other hand, Jackson was found to be an employee of the Cotterills, he would be exempted from industrial insurance coverage under the provisions of RCW 51.12.020(2), which provides that any person employed to do gardening, maintenance, repair, remodeling, or similar work in or about the private home of the employer, is excluded from mandatory coverage of the Industrial Insurance Act. The court found that Mr. Jackson was an employee of Harvey, and thus, entitled to the provisions of the Industrial Insurance Act.

The court, in Jackson, focuses on the consent prong of the Novenson test:

> In workers' compensation law, however, the existence of the employment relationship affects the rights of the employee as much as the employer. The relationship is an agreement between the two. Therefore, for workers' compensation purposes the consent of the employee in entering the

> relationship becomes crucial in ascertaining whether an employment relationship exists. Novenson, at 555.

Jackson, at 516.

Referring to the facts in Jackson, the court held that an employee who agrees to be employed by a homeowner for home renovation work gives up important statutory insurance benefits and must consent to that employment relationship. Requiring this consent:

> allows the employee an opportunity to make an informed choice about accepting employment for which there is no industrial insurance coverage. Thus, the primary focus is properly on the employee's consent to the employment relationship.

Jackson, at 518.

Finally, the court stated:

> We want to emphasize that it is clear from this record and the above facts that Jackson reasonably believed that he worked for Harvey. A worker's bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship. Here, in light of the undisputed facts, any reasonable person in Jackson's position would have believed himself or herself to be working for Harvey. This is an objective determination of the employee's reasonable belief.

Jackson, at 519.

Applying the analysis set forth in Jackson to the facts involving Ms. Booth warrants a finding that Ms. Booth was an employee of DSHS at the time of her injury. The undisputed facts show that Ms. Booth was interviewed by a DSHS employee to determine her qualifications to provide the child care. The facts establish that DSHS controlled payments to Ms. Booth and determined the maximum number of hours she would be compensated in any given month. DSHS employees contacted Ms. Booth periodically, and Ms. Booth contacted DSHS employees from time to time to discuss the care of the children. DSHS prepared Ms. Booth's W-2 tax form, showing the employer as Mr. Thorson, c/o DSHS, and showing DSHS' address. DSHS set the minimum qualifications for Ms. Booth's eligibility to care for the children. Ms. Booth was required to certify to DSHS the hours she worked each month.

Under the Jackson rationale, the focus is on Ms. Booth's consent to the employment and her reasonable belief that she worked for DSHS. We are persuaded that the facts in this record are sufficient to show an objective basis for Ms. Booth's reasonable belief that DSHS was her employer. The facts in this record demonstrate more than Ms. Booth's bare assertion or belief that she worked

for DSHS. We are persuaded that the undisputed facts in this record would lead a reasonable person in Ms. Booth's position to believe she was working for DSHS.[1]

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto, and the Department of Social and Health Services' Response to the Claimant's Petition for Review, we are persuaded that the Department order issued on December 15, 1992, which determined that Ms. Booth was an employee of the Department of Social and Health Services on the date of her industrial injury of October 8, 1992, is correct and should be affirmed.

FINDINGS OF FACT

1. On October 16, 1992, the claimant, Sylvia J. Booth, filed an application for benefits with the Department of Labor and Industries, alleging an industrial injury on October 8, 1992, in the course of her employment with the Department of Social and Health Services. On November 20, 1992, the Department of Labor and Industries issued an order allowing the claim and providing for benefits.

   On December 3, 1992, the Department of Social and Health Services filed a protest and request for reconsideration with the Department of Labor and Industries from the order dated November 20, 1992. On December 15, 1992, the Department of Labor and Industries issued an order determining that the claimant was an employee of the Department of Social and Health Services on the date of injury, October 8, 1992.

   On December 21, 1992, the Department of Social and Health Services filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the order of the Department of Labor and Industries dated December 15, 1992. On January 13, 1993, the Board issued its order granting the appeal, assigning Docket 92 6148, and directing that further proceedings be held on the issues raised in the Notice of Appeal.

2. In May 1991, Sylvia J. Booth began providing in-home child care for six children living in the home of Douglas Thorson. Ms. Booth did not consent to work for Mr. Douglas Thorson as a child care provider in his home.

3. Ms. Booth was contacted by the Department of Social and Health Services to determine her qualifications to provide child care. Ms. Booth was interviewed by an employee of the Department of Social and Health Services. The Department of Social and Health Services determined the amount of compensation paid to Ms. Booth and determined the maximum

[1] We wish to distinguish this case from the decision in the matter of In re Linda J. Bromley, Dckt. Nos. 93 3892 and 93 5100 (January 23, 1995), where we reached the opposite result. Ms. Bromley was a community options program entry system (COPES) worker. The factual pattern was substantially different than in Ms. Booth's case. Even though DSHS supervised the COPES program its involvement with Ms. Bromley was substantially different. Applying the test of Jackson v. Harvey, 72 Wash. App. 507 (1994) does not lead to a conclusion that Ms. Bromley could not have reasonably believed that she was an employee of DSHS.

number of hours she would be compensated. The Department of Social and Health Services periodically contacted Ms. Booth regarding the care of the children. Ms. Booth periodically contacted a case worker for the Department of Social and Health Services regarding care of the children. The Department of Social and Health Services set the minimum qualifications for Ms. Booth's eligibility to care for the children. Ms. Booth was required to certify her hours worked each month to the Department of Social and Health Services. The Department of Social and Health Services prepared Ms. Booth's W-2 tax form.

4. Ms. Booth reasonably believed she was an employee of the Department of Social and Health Services at the time of her injury of October 8, 1992.

5. Ms. Booth was injured on October 8, 1992, in the course of her employment with the Department of Social and Health Services while providing in-home child care. Ms. Booth suffered multiple contusions when she was attacked by a 17-year-old child under her care.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. On October 8, 1992, Sylvia J. Booth was an employee of the Department of Social and Health Services as an in-home child care provider.

3. The order of the Department of Labor and Industries dated December 15, 1992, determining that Ms. Booth was an employee of the Department of Social and Health Services on October 8, 1992, the date of injury, is correct and is affirmed.

It is so ORDERED.

Dated this 23rd day of January, 1995.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENT

This is one of two cases currently before the Board in which government reimbursement for personal services provided to disabled or welfare eligible individuals has given rise to assertions of an employer-employee relationship between a provider and the Department of Social and Health Services (DSHS). The other case is In re Linda J. Bromley, Dckt. Nos. 93 3892 and 93 5100. In both

cases, DSHS lacked authority to hire a worker outside of the provisions of the Public Employment Act, RCW 41.06. In both cases, DSHS acted to monitor publicly funded social service programs. The injured workers provided personal services to individual employers who controlled hiring, firing, the manner and timing of when services were provided, the ultimate number of hours worked, and the ultimate rate of pay. DSHS performance regulations governed eligibility for reimbursement, not eligibility for the employment in general. I am concerned that we do not lose sight of the distinction between governmental oversight of social service programs and the exercise of control over individual activities in an employment setting.

I disagree with the outcome of this appeal because the majority disregards the provisions of the Public Employment Act and takes an overbroad view of the impact of the decision in Jackson v. Harvey. In my opinion, Ms. Booth is a domestic servant employed by Douglas Thorson to provide in-home child care for dependent children in his custody. As such, she is exempted from coverage under the Industrial Insurance Act. RCW 51.12.020(1).

RCW 43.20A.050 provides that the secretary of the Department of Social and Health Services (DSHS) may hire or appoint DSHS employees only to the extent permitted by the state Public Employment Act. That act requires that "all appointments and promotions to positions . . . in the state shall be made on the basis of policies hereinafter specified." RCW 41.06.010. Applicants for employment with the state must demonstrate minimum qualifications for a job classification established by the Department of Personnel or fall within an exemption from the Public Employment Act as enumerated in RCW 41.06.070.

Ms. Booth claims to have been employed by DSHS as an in-home child care provider. There is no legal job classification for state employment as a child care provider in a private home. There is no statutory exemption for such hiring. Neither DSHS nor any employee acting on its behalf had the authority to enter into an employment contract with Ms. Booth.

Had DSHS or any of its employees extended an offer of employment to Ms. Booth in disregard of the provisions of the Public Employment Act, such an offer would have exceeded the statutory authority of the agency. Acts which are beyond certainty that failure to apply equity at this level would only result in its application at a higher level.

I am unaware of any factually similar case compelling us to ignore the dictates of the Public Employment Act in order to establish coverage for a worker under the Industrial Insurance Act. Setting aside my concern about this decision's disregard for the provisions of the Public Employment

Act, I believe that DSHS met its initial burden of showing that Ms. Booth was not an employee. Ms. Booth did not, in my opinion, overcome that showing. The elements necessary to establish an employment relationship were set forth in Novenson v. Spokane Culvert, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979):

> For purposes of [workers'] compensation, an employment relationship exists only when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship. Marsland v. Bullitt Co., 71 Wn.2d 343, 428 P.2d 586 (1967); Fisher v. Seattle, 62 Wn.2d 800, 384 P.2d 852 (1963). The right of control is not the single determinative factor in Washington. A mutual agreement must exist between the employee and the employer to establish an employee-employer relationship.

Because of the majority opinion's emphasis on employee consent, I will address that prong of the Novenson test first. The majority asserts that the holding in Jackson v. Harvey requires us to abandon the requirement of mutuality of consent described in Novenson v. Spokane Culvert in favor of an emphasis on employee consent. I disagree. I believe that the holding in Jackson v. Harvey is specific to the circumstance where an employer claims that a relationship exists and the alleged employee denies it.

The majority opinion oversimplifies the factual setting in Jackson v. Harvey. The contractor, Harvey, was related to the homeowner, Cotterill. Cotterill's home remodelling project was one of two job sites where Harvey employed Jackson. On the other job site, Jackson was unquestionably Harvey's employee and subject to coverage under the Industrial Insurance Act. Harvey paid Jackson for both jobs. Only after Jackson was injured at Cotterill's home did the question of covered versus non-covered employment arise. Only after Jackson was injured did Cotterill claim to be his employer. By doing so, Cotterill attempted to preempt any workers' compensation claim against his relative, Harvey, while himself enjoying the protection of RCW51.12.020, which exempts from coverage any person "employed to do . . . repair, remodeling, or similar work about the private home of the employer."

The facts of Jackson v. Harvey are similar to those in Smick v. Burnup & Sims, 35 Wn. App. 276 (1983), in which the appellate court also explored the consent prong of the Novenson test in the context of an employer attempting to impose a relationship on a worker. In that case, Smick made a personal injury claim against Burnup & Sims. Burnup & Sims raised the existence of an employment relationship as a bar to Smick's personal injury action. In Smick, as in Jackson v. Harvey, the court

had to look closely at employee consent because the employer's consent was already a matter of record. The employee's state of mind was the only undetermined fact. The court's finding that there was no employee consent to the relationship meant the mutuality required by Novenson did not exist.

In Jackson v. Harvey, Jackson could not consent to an employment relationship with Cotterill because he was unaware that Harvey acted in dual capacities in hiring him. Because Jackson's knowledge of the facts was limited, his ability to consent was limited. The necessary mutuality between Jackson and Cotterill did not exist. Harvey's actions controlled the information available to Jackson. He had an admitted employment relationship with Jackson. The court's conclusion that the employment relationship extended to the work which Jackson performed on the Cotterill home was appropriate to that particular set of facts. The Jackson court stated, at 519:

> We want to emphasize that it is clear from this record and the above facts that Jackson reasonably believed that he worked for Harvey. A worker's bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship. Here, in light of the undisputed facts, any reasonable person in Jackson's position would have believed himself or herself to be working for Harvey. This is an objective determination of the employee's reasonable belief.

To extend the decision in Jackson v. Harvey beyond its peculiar fact setting, as the majority opinion in this case does, improperly makes employee consent the controlling factor even where the employer is not attempting to force the relationship on an unwilling worker. This is completely at odds with the spirit and language of Novenson, which requires the finder of fact to look to the intent of both parties in determining the existence of an employment relationship.

The record in the present appeal reveals that there was no mutuality of consent between DSHS and Ms. Booth. DSHS could not legally give such consent and Ms. Booth's belief that she had consented to employment with DSHS was not reasonable. In assessing the reasonableness of Ms. Booth's belief, the majority actually engages in a discussion of those elements traditionally associated with the remaining prong of the Novenson test--control. The majority characterizes a number of DSHS's actions as exercises of control over Ms. Booth. In fact, a review of the facts suggests that DSHS's control was limited to the administration of various social service programs serving Mr. Thorson and the Ackerman children.

DSHS, through Child Protective Services (CPS), placed the Ackerman children in the protective care of their grandmother, Ms. Booth's late sister. CPS oversight of the placement required continued contact between the family and the assigned caseworker, Ms. Mills. With the illness and death of Ms.

Booth's sister, CPS had to find an alternative custodial setting. Custody was assigned to the children's uncle, Mr. Thorson. Unlike his mother, Mr. Thorson was not able to be at home all day to supervise the children. Ms. Booth had already begun caring for the children during his daily absence when the CPS caseworker volunteered to determine whether the family was eligible for child care expense reimbursement.

Reimbursement for child care expenses was available pursuant to RCW 74.12.340 and WAC 388-15-170, governing payments to guardians of children eligible for AFDC grants. As required by WAC 388-15-170(7) and (8), DSHS explored Ms. Booth's suitability as a relative providing child care to be eligible for reimbursement. Per the applicable WAC, DSHS required the claimant and Mr. Thorson to submit proof of hours worked to substantiate entitlement to reimbursement. Mr. Thorson received payment from DSHS and he, in turn, paid Ms. Booth. Mr. Thorson could have received child care services from any provider who met the regulatory guidelines. He chose to continue using his aunt's services. He could pay her more for her services than the amount he was reimbursed by DSHS. He chose not to. Mr. Thorson established Ms. Booth's wages, hours, and conditions of employment. Ms. Booth and Mr. Thorson regularly communicated about the care Ms. Booth was providing, and her daily plan. Mr. Thorson had the authority to direct the claimant's activities, and even to fire her if he was not satisfied with the care she gave the Ackerman children. DSHS's"approval" of Ms. Booth was not tantamount to a hiring. No DSHS representative ever provided the claimant with a personnel form, directed her activities, reviewed her performance, or referred to her as a DSHS employee. Any reference to Ms. Booth as an "employee" was in the context of Mr. Thorson being the "employer." Nor was the fact that DSHS acted as a tax agent dispositive. Providing Ms. Booth with a W-2 form was an accounting service to Mr. Thorson. It was not an assumption of the role of employer by DSHS.

The majority characterizes CPS's authority to remove the children from Mr. Thorson's home if child care arrangements proved unsuitable as equivalent to authority to fire Ms. Booth. In fact, CPS had the authority to revoke placement if <u>any</u> circumstance of the setting violated its standards for the protection of the children. This would be true even if DSHS were not reimbursing Mr. Thorson for child care expenses. Based on this record, one can properly conclude that DSHS's continuing role in the lives of Mr. Thorson and the Ackerman children was to monitor compliance with eligibility standards for the receipt of public assistance in the form of child care expense reimbursement and to provide continued oversight of the CPS placement of the children.

Even under the majority's broad interpretation of Jackson v. Harvey, there is no "objective determination of the reasonableness" of Ms. Booth's belief that she was a DSHS employee at the time of her injury. I would direct the Department to reject the worker's claim for benefits on the grounds that at the time of her injury she was a domestic employee of Douglas Thorson and, therefore, exempt from coverage under the Industrial Insurance Act.

Dated this 23rd day of January, 1995.

/s/
ROBERT L. McCALLISTER Member