Bromley, Linda

EMPLOYER-EMPLOYEE (RCW 51.08.070; RCW 51.08.180)

Home services provider

A worker participated in a DSHS-sponsored program [funded by state and federal monies] providing home services to people who would otherwise be eligible for Medicaid nursing facility care. The Department appropriately rejected the claim on the basis that the worker was excluded from coverage due to the domestic servant exception since there was little evidence of supervision or control over the worker's activities. *Citing Jackson v. Harvey*, 72 Wn. App. 507 (1994) *review denied*, 124 Wn.2d 1003 (1994). ***….In re Linda Bromley*, BIIA Dec., 93 3892 (1995)** [dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LINDA J. BROMLEY	)	**DOCKET NOS. 93 3892 & 93 5100**
	)	
CLAIM NO. N-071072	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Linda J. Bromley, by
The Law Offices of Robert A. Simeone, per
Robert A. Simeone

Employer, Green Hill School,
Department of Social and Health Services, by
The Office of the Attorney General, per
Dana Marie Reid, Assistant

Department of Labor and Industries, by
The Office of the Attorney General, per
Jacquelyn R. Findley, Assistant

This proceeding involves two consolidated appeals arising from the same industrial insurance claim.

Docket 93 3892 relates to a Notice of Appeal filed by the claimant, Linda J. Bromley, on August 9, 1993, from a Department of Labor and Industries order dated February 23, 1993, which directed payment of provisional time loss compensation for the period February 11, 1993, through February 22, 1993, inclusive, in the amount of $237.18, and terminated time loss benefits as paid to February 22, 1993. The August 9, 1993 Notice of Appeal was received by the Department as a protest on April 6, 1993, and forwarded to the Board as a direct appeal on August 9, 1993.

Docket 93 5100 involves a Notice of Appeal filed by the claimant on October 1, 1993 from a Department order dated February 24, 1993, which rejected Ms. Bromley's claim filed for the injury of November 9, 1991, pursuant to the provisions of RCW 51.12.020. RCW 51.12.020(1) excludes, from industrial insurance coverage:

> Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.

The February 24, 1993 order further stated that any overpayment of claim benefits through date of this decision is hereby waived by the director. The February 24, 1993 Department order was communicated to the claimant by notice to claimant's counsel on September 27, 1993.

The February 23, 1993 and February 24, 1993 Department orders are affirmed.

PROCEDURAL AND EVIDENTIARY MATTERS

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 September 9, 1994, which affirmed the February 23, 1993 and February 24, 1993 Department orders.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and these rulings are affirmed.

DECISION

The parties stipulated at conference on January 18, 1994, that the order issued February 23, 1993, should be affirmed if it is determined that the Department was correct in rejecting Ms. Bromley's claim for benefits. Because we affirm the Department's order rejecting the claim, we will not further address the February 23, 1993 Department order (Docket 93 3892).

Although, we agree with our industrial appeals judge that a preponderance of the evidence establishes that Ms. Bromley was not an employee of the Department of Social and Health Services (DSHS), we have granted review in order to more thoroughly discuss the rationale for our decision and coordinate this decision with the decision pending in In re Sylvia J. Booth, Dckt. No. 92 6148.

The Booth appeal and the instant appeal turn on the issue of whether the claimants were, in fact, employees of DSHS and thereby entitled to coverage under the Industrial Insurance Act. In this case, the Department determined that Ms. Bromley was excluded from industrial insurance coverage pursuant to the domestic servant exception of RCW 51.12.020(1). However, the issue litigated was whether Ms. Bromley was an employee of DSHS.

The Community Options Program Entry System (COPES) is a Medicaid program which enables the state to provide home and community based services to people who otherwise would be eligible for Medicaid nursing facility care. The program is funded with a combination of state and federal monies. According to DSHS COPES Program Manager, Mary Lou Pearson, the COPES program does not employ anyone to provide services to entitled recipients. A COPES program recipient (client) may choose to have an individual home care provider or they may choose to have services provided by a contracted home agency. Ms. Pearson testified that the choice of provider is entirely up to the client. This is a federal requirement. The federal government also requires providers to meet certain qualifications, and that payment for services be sent directly to the service providers.

Ms. Pearson indicated that DSHS does not make decisions about hiring or firing providers, that such decisions are entirely up to the client. Case management services for COPES clients are contracted out by DSHS to various community agencies. Case managers perform assessments to determine clients' eligibility and care needs. Case managers make in-home visits to clients in order to monitor the effectiveness of service plans and, presumably, providers. All COPES program providers are required to sign a written agreement called a "COPES Individual Personal Care Provider Contract."

Ms. Bromley was required to sign such a contract prior to providing in-home care to Ms. Olive Schlemlein. The contract, admitted as Exhibit 1 to the Board record, indicates, among other things, that the contractor (Ms. Bromley) is not an employee of the Department nor "will she make any claim of right, privilege or benefit which would accrue to a civil service employee under Chapter 41.06 RCW. This includes, but is not limited to, workmen's (sic) compensation coverage, unemployment insurance benefits, social security benefits, or retirement membership or credit." In his Proposed Decision and Order, our industrial appeals judge found that Ms. Bromley was not an employee of DSHS at the time of her injury. Although we agree with our industrial appeals judge regarding this issue, we disagree with our industrial appeals judge that Ms. Bromley's signing of the COPES contract is "almost conclusive" on this issue.

Ms. Bromley first learned about the availability of the COPES position through her husband's employer. She testified it was her understanding that she had to "go through" DSHS to get the job. Ms. Bromley contacted Roger Trapp, the case manager at Rural Resources, the community action agency which coordinated COPES care in the local area. Ms. Schlemlein's children arranged a meeting at the nursing home between them, Ms. Bromley, Mr. Trapp, and Pat Tadlock, DSHS Social Worker III, a COPES program manager. Ms. Bromley's impression was that she was hired by Ms. Tadlock and that Ms. Tadlock had the right to terminate her employment as a COPES worker.

This understanding as to hiring and firing was contested by both Ms. Tadlock and Mr. Trapp who testified that neither Rural Resources nor DSHS played any part in the selection of Ms. Bromley as a COPES provider for Ms. Schlemlein. According to Mr. Trapp he had no authority to hire or to fire, nor did he hear Ms. Tadlock tell Ms. Bromley she was hired or that she had the authority to fire her.

Ms. Tadlock stated her role is merely to explain how the COPES payment system works. DSHS neither solicits nor evaluates providers, and, in this case, Ms. Tadlock did not monitor Ms.

Bromley's provision of services. It is the client and the client's family who determine how a provider performs services and whether to hire or terminate a provider.

Shortly after the meeting with Ms. Schlemlein, Ms. Bromley moved into the Schlemlein home and began providing services. Ms. Schlemlein was a 94-year-old semi-invalid. Ms. Bromley indicated that she had very little contact with other family members during the time that she provided services to Ms. Schlemlein, which included preparation of meals, bathing, dressing, transporting, shopping, laundry, general housework, and monitoring medications. Although Ms. Bromley stated that she would call Ms. Tadlock to discuss problems about medications, it is clear from a thorough review of the evidence that there was little, if any, direction given to, or for that matter needed by, Ms. Bromley in carrying out her day-to-day duties.

In her Petition for Review, the claimant argues that Ms. Tadlock, as the Department's agent, exercised a degree of control over Ms. Bromley's work activities consistent with an employer/employee relationship. DSHS contends that it lacks authority to be Ms. Bromley's employer, and, in the alternative, did not exercise control over Ms. Bromley's work activities sufficient for Ms. Bromley to have formed a reasonable belief that she was an employee of DSHS.

The recent case, Jackson v. Harvey, 72 Wn. App. 507 (1994), thoroughly explores the issue of employer/employee relationship in a workers' compensation context similar to the one presented here. The Jackson court held that an employee must consent to employment by an employer exempted from providing coverage under the Act. Jackson, at 509. Here, if Ms. Bromley is found not to be an employee of DSHS, she would be exempt from coverage under the Act, pursuant to RCW 51.12.020(1) which excludes persons employed as domestic servants in private homes by employers with less than two employees. The Jackson court cited Novenson v. Spokane Culvert & Fabricating, Co., 91 Wn.2d 550 (1979) for the proposition that an employment relationship must be entered into mutually by the employer and employee. Novenson, at 553. Further, whether an employment relationship exists is determined, in part, by the extent of control the employer has over the employee's activities. Novenson, at 554. Finally, in the workers' compensation context, the consent of the employee in entering the relationship becomes crucial in ascertaining whether an employment relationship exists. Novenson, at 555.

The Jackson court concluded that an employee who agrees to be employed in employment not subject to statutory insurance benefits 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. Deciding that Jackson never consented to employment without industrial insurance coverage, the Jackson court found undisputed facts showing that Jackson reasonably believed that he was working for Harvey (in covered employment). Jackson, at 519. 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.

Our application of the law as set out in Novenson and Jackson to the facts of this case leads to a conclusion that Ms. Bromley could not reasonably have believed that she was an employee of DSHS. The record reveals that DSHS neither solicited nor hired Ms. Bromley, rather it was Ms. Schlemlein and her family who initiated contact with, and hired, Ms. Bromley.

The agreement signed by Ms. Bromley (Exhibit 1), although not determinative, indicates that Ms. Bromley should have realized that DSHS did not consider her to be their employee. Finally, despite the claimant's strenuous contentions to the contrary, the record contains little evidence of supervision or control exercised by DSHS over Ms. Bromley while she was caring for Ms. Schlemlein.

After consideration of the Proposed Decision and Order, Claimant's Petition for Review, and DSHS's Reply to Claimant's Petition for Review, and a careful review of the entire record before us, we hereby make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On December 12, 1991, the Department of Labor and Industries received an application for benefits alleging an industrial injury sustained by the claimant, Linda J. Bromley, on November 9, 1991, while in the employ of the Department of Social and Health Services.

   On February 23, 1993, the Department issued an order paying provisional time loss compensation benefits from February 11, 1993 to February 22, 1993, inclusive, in the amount of $237.18, with time loss benefits terminated on February 22, 1993.

   On February 24, 1993, the Department issued an order which rejected a claim filed for the injury of November 9, 1991, pursuant to the provisions of RCW 51.12.020. RCW 51.12.020(1) excludes from industrial insurance coverage: Any person employed as a domestic servant in a private home

by an employer who has less than two employees regularly employed forty or more hours a week in such employment. Any overpayment of claim benefits through the date of the decision was waived by the Director.

On April 6, 1993, the Department received a protest and request for reconsideration filed by claimant's counsel to the order issued February 23, 1993. The protest was forwarded by the Department to the Board of Industrial Insurance Appeals to be adjudicated as a direct appeal.

On August 9, 1993, the Board received the protest to the order issued February 23, 1993, forwarded by the Department to be adjudicated as a direct appeal. On September 3, 1993, the Board issued an order granting the appeal (subject to determination of timeliness), assigning Docket 93 3892 and directing that proceedings be scheduled.

On September 27, 1993, the Department order issued February 24, 1993, was communicated to claimant by notice to her counsel.

On October 1, 1993, the Board received a Notice of Appeal filed on behalf of the claimant from the Department order issued February 24, 1993. On October 13, 1993, the Board issued an order granting the appeal (subject to determination of timeliness), assigning Docket 93 5100 and directing that proceedings be scheduled.

2. DSHS did not hire the claimant to provide personal care services under the COPES program. The claimant was hired by the COPES client, Ms. Schlemlein and her family.

3. DSHS did not exercise control over Ms. Bromley in her day-to-day activities providing home care to Ms. Schlemlein.

4. Ms. Bromley did not have a reasonable belief that she was an employee of DSHS.

5. At the time of the injury of November 9, 1991, there was no employer/employee relationship between Linda J. Bromley and the Department of Social and Health Services.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter related to these appeals. The appeals were timely filed as contemplated by RCW 51.52.060.

2. On November 9, 1991, no employee/employer relationship existed between the claimant and DSHS as contemplated by Chapter 51.08 RCW and Chapter 51.12 RCW.

3. Docket 93 3892: The order of the Department of Labor and Industries dated February 23, 1993, which directed payment of provisional time loss compensation for the period February 11, 1993 through February 22, 1993, inclusive, in the amount of $237.18 with benefits terminated as paid to February 22, 1993, is correct, and is affirmed.

Docket 93 5100: The order of the Department of Labor and Industries dated February 24, 1993, which rejected a claim filed for injury of November 9, 1991, pursuant to the provisions of RCW 51.12.020, as RCW 51.12.020(1) excludes from industrial insurance coverage:

> Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.

Any overpayment of claim benefits through the date of the decision being waived by the Director, 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 Sylvia J. Booth, Dckt. 92 6148. 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.

While I agree with the outcome of this appeal, the majority's position leaves the door open for a future finding that some individual COPES provider is a DSHS employee based on the individual worker's perception of the situation. I dissent because the majority disregards the provisions of the Public Employment Act and takes an overly broad view of the impact of the decision in Jackson v. Harvey, 72 Wn. App. 507 (1994).

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. Bromley claims to have been employed by DSHS as an individual home-care provider. There is no legal job classification for state employment as an individual home-care provider. 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. Bromley.

Had DSHS or any of its employees extended an offer of employment to Ms. Bromley 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 the specific statutory authority of a government entity are ultra vires and, therefore, void. Chemical Bank v. WPPSS, 102 Wn.2d 874, 910-912 (1984); State v. Adams, 107 Wn.2d 611, 614-615 (1987).

Given that DSHS could not legally establish an employment relationship with the claimant, Ms. Bromley must be seeking equitable relief, asking that DSHS be estopped from denying the existence of such a relationship based on the acts and representations of its employees upon which Ms. Bromley relied.[1] However, under the principle of stare decisis, this Board may provide equitable relief only in cases factually similar to cases which have been passed upon by courts of final jurisdiction. In

[1] Equitable estoppel is available as a remedy only where the following three elements are present: (1) an admission, a statement, or an act inconsistent with a claim afterwards asserted, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. Saunders v. Lloyds of London, 113 Wn.2d 330, 340 (1989). Every element must be shown by clear, cogent and convincing evidence. Mercer v. State, 48 Wn. App. 496, 500 (1987).

re State Roofing & Insulation, Inc., BIIA Dec., 89 1770 (1990). As we noted in In re William H. Pingree, Dckt. No. 91 0116 (May 19, 1992):

> State Roofing . . . quite explicitly limits the Board's application of equitable estoppel to cases factually similar to cases which have been passed upon by courts of final jurisdiction. Under those circumstances, the Board can say with reasonable certainty that failure to apply equity at this level would only result in its application at a higher level.

Pingree, at 5.

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.

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):

> [2] 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 requires us to abandon the requirement of mutuality of consent described in Novenson in favor of an emphasis on employee consent. I disagree. I believe that the holding in Jackson is specific to the circumstance where an employer claims that a relationship exists and the alleged employee denies it.

I disagree with the majority's conclusion that Ms. Bromley's case is similar to that of the claimant in Jackson. In that case, Jackson was hired by Harvey, to remodel a home. Harvey was related to the homeowner, Cotterill, and Harvey directed Jackson's work at the home. Harvey also employed Jackson at a second job site. On the second 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 RCW 51.12.020, 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 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, 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, the question of consent to employment without workers' compensation versus employment with workers' compensation arose only because of the potential employers' active attempts to manipulate the situation to avoid coverage. 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 beyond its peculiar fact setting, as the majority opinion in this case does, improperly makes employee consent the controlling factor even where there is no attempt to force the relationship on an unwilling worker. In the case of DSHS, the majority opinion would elevate employee consent to a higher level than the putative employer's legal authority to enter into an employment contract. 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 majority opinion's emphasis on the Jackson court's statement that the worker must be fully informed of the consequences of accepting employment without workers' compensation coverage is inconsistent with its position that the written COPES provider contract is not determinative of a COPES worker's status. In Ms. Bromley's case, as in all COPES cases, DSHS informed her in writing that she was not employed by DSHS and therefore not entitled to workers' compensation coverage as a DSHS employee. How much more information could DSHS provide about its intentions regarding Ms. Bromley? The question of informed consent as posed in Jackson presupposes a choice which does not exist for a COPES worker. There is no coverage available to her as a domestic servant of the COPES recipient. Ms. Bromley did not have to choose between employment with coverage versus employment without coverage. If she accepted the job with the COPES recipient, she was not eligible for coverage at all.

In any appeal involving a COPES worker, the facts will show that DSHS and its delegated local agency--in this case Rural Resources-- exercise administrative oversight of continued eligibility for reimbursement for COPES services. The disabled individual receiving the services retains full control over hiring, firing, wages, hours, and conditions of employment. DSHS administration of the reimbursement procedures does not in this case--and should not in any COPES case-- constitute intent by the agency to hire the COPES provider as a DSHS employee.

Dated this 23rd day of January, 1995.

/s/_____
ROBERT L. McCALLISTER Member