Meyer, Ronald

EMPLOYER-EMPLOYEE (RCW 51.08.070; RCW 51.08.180)

Volunteers

An informant for a police vice squad was a volunteer and not an "employee" since the services rendered were primarily to further his own interests, and he received no remuneration other than expense advances. **….*In re Ronald Meyer*, BIIA Dec., 42,576 (1975)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD D. MEYER	**)**	**DOCKET NO. 42,576**
	)	
CLAIM NO. G 397161	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ronald D. Meyer, by
Breskin, Rosenblume & Robbins, per
Arnold B. Robbins and Jon A. Iverson

Alleged Employer, City of Seattle, Police Dept., by
Richard E. Mann, Assistant Corporate Counsel

Department of Labor and Industries, by
The Attorney General, per
Brian D. Scott, Assistant

This is an appeal filed by the claimant on May 9, 1973, from an order of the Department of Labor and Industries dated April 18, 1973, which adhered to a prior order rejecting his claim for the reason that he was not under the Industrial Insurance Act at the time of his injury because he was not an employee of the City of Seattle. **SUSTAINED**.

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 by a hearing examiner for this Board on January 25, 1974, in which the order of the Department dated April 18, 1973, was sustained.

The issue presented by this appeal is whether or not the claimant, Ronald D. Meyer, was covered by the Industrial Insurance Act at the time he sustained an injury to his left arm on the evening of September 12, 1972. At that time, he and another man, in the presence of an officer of the Vice Squad of the City of Seattle Police Department, had negotiated for the services of a prostitute, with an offer and acceptance having been made for her services at an agreed price, and when the police officer advised the prostitute, with an offer and acceptance having been made for her services at an agreed price, and when the police officer advised the prostitute that she was under arrest, she became violent and in the resulting altercation the claimant thrust his left arm through a window and lacerated the forearm. His medical and hospital expenses for this injury were paid by the City of Seattle pursuant to City Ordinance 98908, providing for payment of such

expenses when a citizen suffers bodily injury while attempting to assist a police officer in "maintaining the public peace and safety."

The above-described incident occurred during a period of time when the claimant was doing certain activities as an informant for the Seattle Police Department Vice Squad. He performed these informer activities between June of 1972 and January of 1973, principally in connection with the Vice Squad's investigations of violations of the laws against prostitution, and also to some extent in connection with enforcement activities regarding illegal gambling and pornography.

It is the claimant's contention that these activities, in light of all surrounding circumstances, constituted an employer-employee relationship, so that he was engaged in "employment" for the Seattle Police Department, and thus entitled to compensation under the Act. The Department of Labor and Industries and the City, on the other hand, contend that there was no employment relationship, and the claimant was only a volunteer in his informant activities; and this was the holding of our hearing examiner in his Proposed Decision and Order sustaining the Department's rejection of the claim. The pertinent facts describing claimant's activities, and how it came about that he was performing them, are quite well set forth in the hearing examiner's proposed order. We will not summarize these facts again in all details here, except as necessary to resolve claimant's contention that he was, as a legal matter, covered under the Act.

It is clear, of course, that an employment relationship is an indispensable basis for normal coverage of workmen's compensation laws, and this is obviously true of our Act, with its repeated references to "employment," "course of employment," "engaged in employment," etc. The existence of a contract of hire, express or implied, is generally required. The rationale for this is that compensation law is a mutual arrangement whereby employers and employees both give up and gain certain rights and responsibilities; and since these are reciprocal rights between employer and employee, it is necessary to look to the agreement between them to determine if the employment relationship exists. See Vol. 1A, Larson on Workmen's Compensation Law, Sec 47.10. Further, a contract of employment connotes payment of some kind by the employer for the services performed by the employee (Larson, supra, Sec. 47.41), although the required element of payment or remuneration need not necessarily be in wages or fixed sums of money, but may be anything of value such as board, room, training, groceries and supplies, etc. (Larson, supra, Sec. 47.43(a); Garney v. Department of Labor and Industries, 180 Wash. 645.

On the other hand, gratuitous workers or volunteers are not covered, in the absence of special statutory provisions, because the element of payment for services rendered is lacking, and the concept of "employee" excludes persons who do not receive or expect to receive any kind of remuneration for their services. Although performance and acceptance of valuable services normally implies the expectation of payment for the services, this implication does not arise if the factual circumstances themselves negate any payment for the services (Larson, supra, Sec. 47.41).

Viewing this record in light of the foregoing principles, there certainly was no express contract of employment. No formal agreement, written or oral, was entered into by the parties, and no wages as such were paid to claimant by the Seattle Police Department. We recognize, of course, that an implied contract of employment can be established by the parties' conduct and the surrounding circumstances. Wilkie v. Department of Labor and Industries, 53 Wn. 2d371. In this regard, there were certain monies advanced to claimant, but the Police Department's evidence, and the claimant's own testimony, was that these advances were solely intended as "expense money" to defray the claimant's necessary personal expenses and cash outlays in carrying out his informant activities, and were not intended as remuneration which inured, in any part, to his personal use and benefit. Claimant contends that he did personally "profit" to some extent, in cash and in kind, and thus he was "paid" for his activities over and above the necessary expenses, and a contract of employment must be implied from these circumstances.

The facts relied on by claimant in support of this position, as summarized in his Petition for Review, are the following:

(1) When his visits to massage parlors or other establishments resulted in an agreement with a prostitute and a consummation of the sexual acts purchased, he kept the difference between what he spent and the $40.00 per night which the Vice Squad gave him for expenses;

(2) On a couple of occasions when he bought pornographic material on a Sunday, he was given $20.00 for that service, and on some occasions when he purchased a pornographic film he was allowed to keep $10.00 of the $50.00 he was given to buy the film;

(3) In connection with surveillance of suspected prostitution and/or illegal gambling in two apartment houses, claimant was given the use of an apartment during two different one-month periods in 1972;

(4) On evenings when claimant used his care as a "sneaker" car, gas money was provided, a meal was provided, and drinks were frequently provided;

(5) On one occasion, claimant was given $20.00 in payment for testimony at a prostitution trial.

While the facts in items (1) through (4), taken individually, are apparently correct, they do not by any means show the complete picture as to whether claimant really received anything of value as payment for his informant activities. As to item (1), the record shows that when the prostitutes' services were consummated, the prevailing price charged the claimant was $30. of his $40. expense money, and, in addition, he had miscellaneous related expenses concerning his car, a meal, and quite frequently alcoholic beverages. Clearly, little of the money was left for his own personal use. Furthermore, on nights when his activities and contacts were for any reason unsuccessful in actual consummation of an act of prostitution, he then had to return the entire $40. to the Vice Squad, and to the extent that he had related costs on these occasions, such as gas for his car and drinks for a suspected prostitute, he was actually out-of-pocket for these expenses with no reimbursement. This would pretty much balance off the other nights when he had a little left over from the $40. The claimant frankly admitted that he never knew if he was going to get any "little extra" out of this expense money.

As to the matter of purportedly having use of a "free" apartment for a couple of months, there is no proof in this record that this constituted anything of value which benefited the claimant. The record shows that, during the entire period here involved, the claimant had a regular place of residence in the south end of Seattle, and there was no proof that any of his living expenses, such as rent or other costs of his regular residence, were in any way diminished or offset because he was in these apartments "occasionally" to do surveillance on possible gambling or prostitution. In our view, the apartments were of value to the Vice Squad's law enforcement activities, not to the claimant.

Concerning alleged factual item (5) relied on by claimant, we do not agree that claimant actually received the $20.00 as "payment" for giving testimony at a prostitution trial. He testified on this point as follows"

> "Q How about payment in connection with testimony?
>
> A No. On one instance after a prostitution trial, after I had been out of the hospital, Detective Birkeland gave me twenty dollars after we left the court one time, and said that, 'Here, this might help you out'."

****

"Q You mentioned something about Detective Birkeland gave you twenty dollars. Did you state that was after a court appearance?

A Yes, it was.

Q You mentioned where, you quoted something, he said, "Perhaps this would help you out', what was the context of this?

A This was after I had just gotten out of the hospital, about three weeks.

Q What do you understand him to have meant when he said –

A He probably knew I didn't have any money." (Emphasis supplied)

The import of this is clear. Claimant was not paid for testifying in court, and he did not expect to be. He was given this pure gratuity, simply out of sympathy for getting hurt. Any doubt on this score is resolved by his further testimony herein that he testified in court in connection with criminal prosecutions, not once, but on 15 or 20 occasions. For all of these appearances, and the obvious effort and expenses related thereto, he received absolutely no recompense. Whatever "little extra" he may have retained as "profit" from the expense advances given him for prostitution contacts and pornography purchases were obviously more than offset by his financial "loss" on the many appearances as a witness in court.

It is also of importance that Larson, in his discussion in Sec. 47.41 of gratuitous workers who are not covered because they neither receive nor expect to receive any kind of pay for their services, sets forth as one of the examples of this principle, (Sec.47.41(c)) persons who volunteer to assist others basically to advance their own interests. While none of the judicial decisions cited therein are factually on "all fours" with the instant case, the principle is applicable. Our clear impression from this record, taken as a whole, is that claimant was basically interested in furthering his own interests through his contact with the Vice Squad -- whether those interests were in being able to do some surveying of the tavern business in Seattle (As he stated at one point in his testimony), or whether those interests were in having his expenses paid for "entertainment" for himself. In any event, we draw the conclusion from this entire record, including in part claimant's own admissions, that he was a volunteer and not an employee of the Police Department.

Finally, one further legal argument is advanced by claimant which we believe is clearly not well taken. This is the argument that all "volunteers" are covered by the Act and that the only "volunteers" who are partially excluded from coverage are those who are volunteers for state

agencies who, by virtue of RCW 51.12.035, are entitled only to the medical aid benefits under the Act.

We cannot agree with this argument, because the premise on which it is based, namely, that volunteers or gratuitous workers are the same as employees for mandatory coverage purposes, is wrong. For the reasons we have heretofore discussed, volunteers are not employees inasmuch as the very basis of the employee-employer relationship is the performance of service in return for some kind of remuneration therefor, whereas volunteers by definition are rendering service for which remuneration is not received or expected to be received.

It was in recognition of the obvious fact that no volunteers are covered by the normal "employment" criterion, that the Legislature in 1971 (Chapter 20, Laws of 1971) decided to pass the special statute, now codified as RCW 51.12.035, providing that volunteers for state agencies only should be "deemed" to be employees or workmen, for the limited purpose of medical aid benefits under the Act. It was necessary that they be "deemed" employees, since otherwise under normal legal principles they do not have employee status.

The fact that this 1971 legislation was intended to broaden the coverage of the Act to a certain class of volunteers not theretofor covered (rather than, as claimant argues, to limit the scope of coverage as to this certain class because all other volunteers are covered anyway) is effectively demonstrated by action taken by the 1975 Legislature (Chapter 79, Laws of 1975 1st ex. sess.). This legislation amended RCW 51.12.035 to provide for the same type of medical aid coverage under the Act for volunteers for cities, counties, other political sub-divisions, and private nonprofit charitable organizations (at the option of those governmental units or organizations), as had been provided since 1971 for volunteers for state agencies. This action clearly indicates the legislative intent to further expand this special coverage for volunteers because in those areas there had been no coverage before 1975 -- and one of those areas was, of course, gratuitous workers or volunteers for cities.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a very careful and thorough review of the entire record herein and the applicable legal authorities, we are convinced that the Proposed Decision and Order was correct in proposing to sustain the Department's rejection order, on the ground that the claimant was not an employee of the City of Seattle.

The hearing examiner's proposed findings, conclusions and order are hereby adopted as this Board's findings, conclusions and order and are incorporated herein by this reference.

It is so ORDERED.

Dated this 10th day of October, 1975.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairman

/s/_____
R. M. GILMORE Member

/s/_____
SAM KINVILLE Member