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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001121-WC

NATHANIEL EDWARD MAYSEY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-16-81368

EXPRESS SERVICES, INC.;
HONORABLE W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Nathaniel Edward Maysey appeals from the decision of the Workers' Compensation Board affirming the Administrative Law Judge's (ALJ's) decision not to grant him a 30% enhancement of benefits for a safety

violation pursuant to Kentucky Revised Statutes (KRS) 342.165(1) against Express Services, Inc. Because under current Kentucky law, a temporary help service agency was Maysey's sole employer at the time of his injury, we reluctantly affirm.

Maysey graduated from high school and then, shortly thereafter, began working for Express Services, a temporary help service,[1] which placed Maysey at Magna-Tech Manufacturing, LLC, in Glasgow, Kentucky. On June 6, 2016, Maysey's sixth day working at Magna-Tech, Maysey's left arm was amputated above the elbow by a centrifuge machine.

The accident occurred on Line 46, an impregnation machine made up of six smaller machines which operated simultaneously. It was Maysey's first day working on Line 46 after receiving minimal training and then being left on his own to feed buckets of parts through the six machines from his location on a catwalk.

Part of Maysey's duties was to place a bucket of parts into a centrifuge, where the bucket would rotate clockwise, stop, and then rotate counter-clockwise before completing a cycle. He was then to reach into the point of operation on the machine, attach a hoist hook to the basket of parts, and lift it out of the machine. Maysey was attaching a hoist hook to the basket in the centrifuge

[1] The term "[t]emporary help service," defined by KRS 342.615(1)(f), is more precise than the terms "temporary staffing agency," "temporary labor company," "contract labor company," and similar terms.

when the machine started again and the chain and cable connected to the hook wrapped around his left arm and began to twist. Concerned that the machine was going to pull him in, he leaned back and in the process, his arm tore from his body just above the left elbow. Maysey underwent nine surgeries to reattach his amputated arm and continues to undergo physical therapy but has limited use of his arm and is unable to grip or pick up objects with his left fingers.

Maysey filed a claim for workers' compensation benefits against Express Services. He reached a partial settlement with Express Services with the only unsettled question being whether Maysey was entitled to an enhancement of his benefits on the basis that Express Services failed to make a good faith effort to comply with its duty under KRS 338.031(1)(a). The statute states that "[e]ach employer . . . [s]hall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" *Id*. If KRS 338.031(1)(a) was violated, Massey would qualify for additional benefits under KRS 342.165(1), which provides in part as follows:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall

> be increased thirty percent (30%) in the amount of each payment.

Maysey claimed Express Services failed in its duty to provide a safe worksite by failing to inspect Line 46 prior to his accident, failing to identify the need for point of operation guarding on the centrifuge, and failing to review the safety audit and risk assessments for Line 46. Consequently, Maysey argued, Express Services failed to verify that the Magna-Tech workplace was free from recognized hazards that cause or are likely to cause death or serious physical harm prior to placing Maysey at work.

Based on the testimony of the witnesses, including Maysey, OSHA inspectors, and Magna-Tech's Operation Manager, there was substantial evidence that there were multiple hazards to Maysey from Line 46, including lack of adequate guarding on the centrifuge, an intentional disabling of the centrifuge's safety protocols relating to its lid and software, problems with its indicator lights, the lack of an accessible emergency stop accessible from the centrifuge, and insufficient training provided to Maysey as to how to operate it.[2] As a result,

[2] Maysey testified the centrifuge did not have a light that came on to indicate when the machine had completed both cycles and did not have an emergency stop accessible to the centrifuge. Charles Anthony Morley, a Kentucky OSHA Safety Compliance Officer assigned to investigate Maysey's accident, testified he learned from his inspection and employee interviews that the centrifuge was being operated while its top was open so that employees could visually determine if the centrifuge had stopped spinning because the indicator lights showing when the centrifuge had completed its cycle did not always function properly. Morley testified he learned that the emergency stop on the railing in front of the centrifuge was inoperable. Morley testified he learned from Godfrey and Wing, the centrifuge's manufacturers, that the centrifuge was designed

OSHA cited Magna-Tech for safety violations, including a general duty violation for Magna-Tech failing to provide a workplace free of hazards and a citation for machine guarding not adequately protecting the employees from harm. However, the question before the ALJ and the Board was not whether Magna-Tech intentionally failed to comply with safety regulations, but whether Express Services did so, entitling Maysey to additional benefits from Express Services pursuant to KRS 342.165.

Mary Elizabeth Card, Express Services Safety and Operation Manager, testified that new employees for temporary jobs receive general safety training in the form of a video and Express Services asks employees to notify it of any safety concerns. Card testified that when Express Services begins working with an employer, it usually undertakes an on-site inspection of the facility where it will place workers, but she did not know whether this had been done with Magna-Tech. She testified that before providing employees, Express Services inspects each facility and its machinery. Card testified she was not notified by Maysey or anyone else of any unsafe working conditions at Magna-Tech.

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not to operate while its top was open, and the top would not open unless the centrifuge's two cycles had come to a complete stop; the machine's functioning in this regard was regulated by computer software and designed to prevent accidents. Morley testified he understood that the centrifuge could only operate with its top open if the computer program regulating this was intentionally bypassed. Mary Elizabeth Card, Express Services Safety and Operation Manager, testified that in her investigation of Maysey's accident she learned from interviewing two Express Services employees that the centrifuge's computer programing had been bypassed.

The ALJ was not convinced that Express Services acted intentionally in subjecting Maysey to an unsafe worksite, where its right to inspect was limited and it was unclear whether even if Express Services did inspect, it could have recognized the particular defects that placed Maysey at risk. The ALJ noted that OSHA did not include Express Services as a party or suggest it committed a safety violation. The ALJ concluded that considering the lack of knowledge, approval, direction, or acquiescence on the part of Express Services in the condition of Line 46 and the centrifuge, it could not enhance Maysey's benefits. The ALJ admitted this was a harsh result in that Maysey's accident "could and should have been prevented" but the party at fault, Magna-Tech, was insulated from liability because Maysey was furnished to it by Express Services.

Maysey filed a petition for reconsideration. The ALJ made additional factual findings that Maysey requested but opined that Card's testimony relating to Express Services' inspections of jobsites did not create a legal duty for Express Services to inspect where there was no duty imposed by statute.

The Board determined that the ALJ engaged in an appropriate analysis in determining that Express Services did not intentionally violate the general duty statute. The Board opined there was substantial evidence to support the ALJ's determination that Express Services did not violate its duty towards Maysey and affirmed.

KRS 342.615(5) provides: "A temporary help service shall be deemed the employer of a temporary worker and shall be subject to the provisions of this chapter." "KRS 342.615(5) does not permit a temporary employee to be viewed as being the client's employee." *Labor Ready, Inc. v. Johnston*, 289 S.W.3d 200, 207 (Ky. 2009). There is no dispute that Express Services, as Maysey's employer, was liable for workers' compensation benefits. The issue here is whether Express Services can be liable for the statutory penalty for the safety violations of Magna-Tech, the host employer.

The purpose of the penalty statute, KRS 342.165(1) is "to penalize those employers who intentionally fail to comply with safety regulations." *Ernest Simpson Const. Co. v. Conn*, 625 S.W.2d 850, 851 (Ky. 1981). Two conditions must be met for the penalty to be imposed. "The accident to the employee must have been caused by: 1) the employer of the injured party, and, 2) the employer must be the employer who would otherwise have been liable for the payment of [workers'] compensation benefits." *Id*.

In *Conn*, a general contractor's safety violations resulted in the death of an employee of a subcontractor who had workers' compensation insurance. The Kentucky Supreme Court reversed our Court, which determined that the general contractor was the employer of Conn for the purposes of assessing a penalty under KRS 342.165(1). The Supreme Court held:

> Under the specific wording of the statute, for the "employer" to be liable for the penalty, he must have been the employer of the injured party and must "otherwise have been liable under this chapter" (for compensation benefits). Since Simpson was not liable for the benefits and, moreover, since Simpson was not the employer of the decedent, neither of the requirements of the statute has been met.

Id. The Supreme Court acknowledged that the result was troubling in that it allowed the violator to escape liability and defeat the purpose of penalizing the person or entity guilty of a safety violation, stating:

> It may be true, as the Court of Appeals implies, that since [the general contractor's] action caused the death of Conn, there is some injustice in denying a recovery to his widow. However, the General Assembly which authored the penalty statute provided the conditions for the application thereof and, as stated, they are not applicable to the case at bar. What we have here is a hiatus in the law, which can only be eliminated by legislative action.

Id.

After *Conn*, our Supreme Court held a temporary employee's exclusive remedy was workers' compensation so that a common law civil action could not be maintained against a host employer who obtains a temporary employee through a temporary help service. *U.S. Fid. & Guar. Co. v. Tech. Minerals, Inc.*, 934 S.W.2d 266, 269 (Ky. 1996). The Supreme Court opined that if it permitted a common law civil action to proceed, "no employer in his right mind would hire such an employee. The effect . . . would be to destroy the

temporary services industry." *Id*. With a host employer not liable for workers' compensation benefits, not liable for any penalty for safety violations under our statutory scheme, and not liable for any common law liability for injuries caused to a temporary employee obtained through a temporary help service, not surprisingly, the temporary help service industry has flourished.

In *Jones v. Aerotek Staffing*, 303 S.W.3d 488 (Ky.App. 2010), this Court addressed whether the temporary help service agency could be liable for the penalty provided for in KRS 342.165(1) as Jones's employer. Like Maysey, Jones was working through the temporary employment agency, Aerotek, which placed him at MISA. He was injured after guarding in the form of a switch that disabled the laser cutting machine that he was working with was deliberately bypassed by personnel at MISA. *Id.* at 489-90. Jones sought a safety violation enhancement from Aerotek on the basis that Aerotek failed to provide him with a safe workplace. The Court rejected this claim, explaining as follows:

> Jones provided proof, which was uncontroverted, that MISA employees disabled the automatic shut-off switch on the machine doors. That evidence would likely be sufficient to establish that MISA intentionally violated its duty to provide a safe work place to its employees and that MISA intentionally violated the federal safety regulation cited by the [ALJ.] However, Jones did not produce any evidence that Aerotek, his employer, participated in disabling the shut-off switch or even knew that the switch had been disabled. Therefore, the ALJ and the Board correctly denied Jones's claim for enhanced benefits because he did not establish any

> "intentional failure to comply with" a safety statute or regulation on the part of his employer, Aerotek.
>
> We note Jones's argument that Aerotek, like every employer, has a duty to provide a safe work place for its employees. KRS 338.031(1)(a). However, we do not believe that duty extends as far as Jones would like. Taking Jones's argument to its logical conclusion, Aerotek would be required to be familiar with all of the equipment in the facilities where it places employees, all of the federal and state regulations regarding that equipment, and all other federal and state safety regulations related to a particular facility or industry. Furthermore, Aerotek would be required to perform an initial inspection prior to placing employees in a facility and to perform ongoing inspections thereafter to assure itself that no safety violations had occurred or were occurring. We agree with the Board that there is no "credible evidence" that such duties exist. Absent such duties, we agree with the Board that, to establish that a temporary employment agency intentionally violated a safety statute or regulation, an employee must show that the agency "had knowledge of, approved of, directed, or acquiesced in" its client's actions. We agree with the Board that, if there had been evidence that Aerotek had a duty to inspect the premises or knowledge that the shut-off switch had been disabled, the result might have been different. However, absent that evidence, we must conclude that the ALJ and the Board correctly determined that Aerotek is not responsible for this safety violation by MISA.

Id. at 491-92. Although this Court rejected the notion that under our statutory scheme the temporary help service agency could be liable for the penalty, this Court echoed *Conn* and its disapproval of the statutory scheme stating that

"the result in this case appears unduly harsh and unfair[.]" *Id*. at 492 (internal quotation marks omitted). We noted that despite the safety violations, "Jones has absolutely no recourse whatsoever against the arguably negligent, even reckless, acts of MISA." *Id*. (internal quotation marks omitted). This Court urged "that this matter be reviewed by the legislative branch." *Id*.

In *Jones*, this Court suggested that liability for a safety violation could be imposed on a temporary help service where the service "had knowledge of, approved of, directed, or acquiesced in" the host employer's safety violation. *Id*. at 491. Given the nature of the relationship between a temporary help service and the host employer and that the host employer controls the day-to-day-operations of the workplace, that is a highly unlikely situation. More common is the situation here, where there is only a limited right to inspect the workplace or knowledge of the day-to-day condition of the workplace. In that case, *Jones* teaches that there can be no liability for the penalty in KRS 342.165(1).

Unfortunately, more than three decades after our Supreme Court held in *Conn* that KRS 342.165(1) is a "hiatus in the law," 625 S.W.2d at 851, and countless temporary workers have been injured by safety violations in the workplace, nothing has changed in the applicable statutory law. Consequently, no statutory penalty can be imposed on Express Services. Under current Kentucky law, a host employer escapes liability for any penalty no matter how egregious the

safety violation and generally, the temporary service agency escapes liability for the penalty. Consequently, safety violations go unpunished and the deterrent value of the penalty under KRS 342.165(1) is eviscerated. Yet, as the federal government has recognized, temporary employees are uniquely susceptible to injury caused by safety violations.

A memorandum to OSHA regional managers dated July 15, 2014, from Thomas Galassi, Director, Directorate of Enforcement Programs, highlights the plight of temporary workers and OSHA's response.[3] We, of course, do not cite this memorandum as authority but only to emphasize the enormity of the problem and the urgency of the need for the General Assembly to act. In part, it states:

> On April 29, 2013, OSHA launched the Temporary Worker Initiative (TWI) in order to help prevent work-related injuries and illnesses among temporary workers. The purpose of this initiative is to increase OSHA's focus on temporary workers in order to highlight employers' responsibilities to ensure these workers are protected from workplace hazards.
>
> As detailed in the documents posted on our website (www.osha.gov/temp_workers), temporary workers are at increased risk of work-related injury and illness. In recent months, OSHA has received and investigated many reports of temporary workers suffering serious or fatal injuries, some in their first days on the job. Numerous studies have shown that new workers are at greatly increased risk for work-related injury, and most temporary workers will be "new" workers multiple times

[3] This memorandum is found at https://www.osha.gov/memos/2014-07-15/policy-background-temporary-worker-initiative (last visited February 4, 2020) (footnote omitted).

> a year. Furthermore, as the American economy and workforce are changing, the use of temporary workers is increasing in many sectors of the economy.

The memorandum further noted that "both the host employer and the staffing agency have responsibilities for protecting the safety and health of the temporary worker under the OSH Act." Finally, the memorandum concludes:

> Too often in recent months, it has been OSHA's sad duty to investigate fatalities and injuries involving temporary workers who were not given the necessary safety and health protections required under the Act. In the TWI, we are attempting to ensure that all employers, whether host or staffing agency, individually and collaboratively, fulfill their duties to their workers, so that at the end of the shift of every work day, all temporary workers in the United States can return home safely.

It is not within the judicial role to propose legislation nor can this Court overrule Kentucky Supreme Court precedent. However, this Court urges the legislature to specifically address the issue presented in this and similar cases by making the host employer statutorily liable for any safety violations that injure temporary workers provided by a temporary help service. In the meantime, we urge the Kentucky Supreme Court to revisit the issue. As it has evolved, the temporary help services industry has flourished, and Kentucky temporary workers are at high risk for injury due to safety violations. The applicable case law as it exists does not comport with the general rule that the workers' compensation statutes are to be "liberally construed to effect their humane and beneficent

purposes." *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 802 (Ky.App. 1995). While the Supreme Court cannot rewrite the statute and make the host employer liable for a safety violation, the temporary help service, as the employer, can be liable for any penalty. The temporary help service industry would not be destroyed. A temporary help service could, by contract, establish a right of indemnity against the host employer placing the burden of maintaining a safe workplace on that host employer.

With the reluctance expressed in this opinion, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

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