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NOTES

A CONSTITUTIONAL REMEDY FOR INJURED EMPLOYEES

Gerald B. Murphy

INTRODUCTION

The 1973 Constitution of Montana includes Section 16 of the Declaration of Rights which states:

Courts of Justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provided coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial or delay.¹

This section repudiates established Montana law as well as the 1971 Montana Legislature's rejection of similar legislation.

The purpose of this note is to discuss the three avenues (Judicial, Legislative, and Constitutional) used by the advocates of Section 16 to accomplish their desired result: to allow an employee of an independent contractor to bring a third party liability suit against his general employer. In order to put this discussion in proper context, it is initially necessary to trace the development of Worker Welfare laws.

HISTORY

Prior to the enactment of Industrial Accident Laws, injured workmen were rarely compensated for their injuries. Industry had generally escaped this burden by asserting available common-law defenses such as assumption of risk, contributory negligence and the fellow servant doctrine.² These defenses were utilized so effectively that few injured workmen received compensation.³ Workmen's Compensation Laws were thus enacted to remedy the situation.⁴ The theory of the laws was to provide compensation, or in effect insurance, to an injured employee regardless of how he was injured.⁵ An injured employee would recover

¹Proposed 1972 Constitution for the State of Montana, Official Text with Explanation.

On November 2, 1971, 100 delegates were elected from twenty-three districts to the 1971-72 Constitutional Convention. A three day organizational session was held beginning November 29, 1972. The main session was convened on January 17, 1972. . . . After meeting for fifty-four working days the Convention adjourned sine die on March 24, 1972.

The new constitution was accepted by the people of Montana on June 6, 1972, and the constitution took effect on July 1, 1973.

²Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954).

³*Id.*

⁴Staton v. Reynolds Metals Co., 58 F. Supp. 657 (D.C.W.D. Ky. 1945).

⁵Dunn v. N.D. Workmen's Compensation Bureau, 191 N.W.2d 181 (N.D. 1971).

whether he was injured due to his own or his employer's negligence.⁶ To come under the act, both the employer and employee must make an election, and by so electing, the employee surrenders his right to sue the employer for additional damages.⁷

There are at least two types of workmen's compensation provisions limiting the common-law actions against general employers: (a) those which merely require the general employer or independent contractor to see that his independent contractor or subcontractor carries compensation insurance,⁸ and (b) those which directly impose liability on him for injuries to the employees of his independent contractor or subcontractor.⁹ Montana has the former provision set forth in R.C.M. 1947, § 92-438.¹⁰ Since Montana had not decided the question of whether R.C.M. 1947, § 92-438 would permit a third party liability suit against a general employer, injured employees sought judicial clarification of Montana's workmen's compensation laws.

JUDICIAL REMEDY

The Montana supreme court in *Ashcraft v. Montana Power Co.*¹¹ interpreted Montana's workmen's compensation laws. In *Ashcraft*, the plaintiff was an employee of Swain & Morris, an independent contractor of the defendant, Montana Power Company. He was injured when the power pole on which he was working fell to the ground. Montana Power had required Swain & Morris to come within the Workmen's Compensation Act. The Montana supreme court ruled that since Montana Power had required the independent contractor, Swain & Morris, to come within the Workmen's Compensation Act, the injured employee was precluded from maintaining a third party liability suit against his general employer. The court's decision was based on R.C.M. 1947, § 92-438 which reads in part:

⁶*Barber Asphalt Corporation v. Industrial Commission*, 193 Utah 371, 135 P.2d 266 (1943); *Spencer v. Industrial Commission*, 4 Utah 2d 185, 290 P.2d 693 (1955).

⁷REVISED CODES OF MONTANA 1947, § 92-204 [hereinafter cited as R.C.M. 1947].

⁸A. LARSON, WORKMEN'S COMPENSATION, 175 (1970); *Anderson v. Sanderson & Porter*, 142 F.2d 58 (8th Cir. 1944); *Huffstettler v. Lion Oil Co.*, 110 F. Supp. 233 (D.C. S.D. Tex. 1953). Jurisdictions that have this type statute: Louisiana, Maryland, Massachusetts, Missouri, North Dakota, Oklahoma, Puerto Rico, and South Carolina.

⁹*Hoffman v. Cudahy Packing Co.*, 161 Kan. 345, 167 P.2d 613 (1946); *Shuck v. Hendershot*, 185 Kan. 673, 347 P.2d 362 (1959). Those jurisdictions that have this type statute: Arkansas, Colorado, Georgia, Illinois, Nebraska, North Carolina, Ohio, Tennessee, and Wisconsin.

¹⁰R.C.M. 1947, § 92-438 reads as follows:

Independent Contractor defined. "An independent contractor" is one who renders service in the course of an occupation, representing the will of his employer only as the result of his work, and not as to the means by which it is accomplished. But the legal defense of independent contractor shall not bar otherwise compensable industrial accident claims against employers except when such defense is interposed on behalf of a party who has previously required the claimant's immediate employer to come within the Workmen's Compensation Act.

¹¹*Ashcraft v. Montana Power Co.*, 156 Mont. 368, 480 P.2d 815 (1971).

. . . but the legal defense of independent contractor shall not bar otherwise compensable industrial accident claims against employers except when such defense is interposed on behalf of the party who has previously required the claimant's immediate employer to come within the Workmen's Compensation Act.¹²

The court also stated: "Since the contract in the instant case designated Swain & Morris an independent contractor who was required by the defendant to carry workmen's compensation insurance, the defendant is completely immune from liability under R.C.M. 1947, § 92-438."¹³

The Montana supreme court denied plaintiff the judicial remedy he sought. In this three to one decision the court stated that the exclusive remedy against a general employer by an injured employee of an independent contractor required to carry workmen's compensation insurance is that provided by the Workmen's Compensation Act.¹⁴ The general employer acquires complete immunity from third party liability suits by conforming to R.C.M. 1947, § 92-438.¹⁵

*Buerkel v. Montana Power Company*¹⁶ was decided subsequent to the *Ashcraft* decision and is considered a sequel to *Ashcraft*.¹⁷ In *Buerkle*, the plaintiff, a lineman employed by Duty & Jones Construction Company, an independent contractor of the defendant, was injured during the course of his employment. As he was working on a pole, another employee caused a boom on a mechanical digger to hit the pole. The pole snapped and fell injuring the plaintiff. The plaintiff alleged that the defendant, as a landowner, had a duty to use reasonable care in maintaining its premises in a safe condition. The plaintiff also alleged that the defense of "statutory employer" was not available to a general contractor where his subcontractor is enrolled under the Workmen's Compensation Act, and it is the contractor's negligence that causes injury to the subcontractor's employee.¹⁸

Relying on the *Ashcraft* decision, the court ruled that R.C.M. 1947, § 92-438,¹⁹ when read in conjunction with R.C.M. 1947, § 92-604²⁰ and

¹²*Id.* at 370.

¹³*Id.* at 371. It should be noted that the court also stated:

This rule of law does not apply to any other situation where the status of the injured employee's immediate employer is found to be other than an 'independent contractor,' or where the general contractor does not require an independent contractor to carry workmen's compensation insurance. Likewise, this rule of law does not apply to the independent tortfeasors who are 'strangers to the employment' under section 92-204, R.C.M. 1947.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Buerkle v. Montana Power Co.*, 157 Mont. 57, 482 P.2d 564 (1971).

¹⁷*Id.*

¹⁸*Id.*

¹⁹R.C.M. 1947, § 92-438, *supra* at note 10.

²⁰R.C.M. 1947, § 92-604 reads as follows:

Employer liable when lets work to other than independent contractor. Where any employer procures any work to be done, wholly or in part for him, by a contractor other than an independent contractor, and the work so procured to be done is a part or process in the trade or business of such employer, then such

§ 92-204,²¹ precluded plaintiff's recovery. The court noted:

. . . section 92-438 prevents a general contractor from using the defense of 'independent contractor' where he does not require an employee's immediate employer to carry workmen's compensation insurance. Therefore, if the general contractor cannot use the 'independent contractor' defense, then, he falls within the scope of section 92-604, which as previously described makes him exclusively liable for compensation under the Workmen's Compensation Act in accordance with section 92-204. Therefore, if section 92-438 in conjunction with sections 92-604 and 92-204 limit the liability of a general contractor exclusively to compensation under the Workmen's Compensation Act in circumstances just described, is it reasonable under the same statutes to assume that where a general contractor requires the employee's immediate contractor to carry workmen's compensation insurance, the general contractor is not immune from a common-law liability suit as a third party? This court does not believe so.²²

Strengthening the Montana supreme court's interpretation of the Workmen's Compensation Act was a recently decided federal case, *Campbell v. Shell Oil Company*.²³ Although *Campbell* is a federal decision it adds to the state court's interpretation because the federal judge was obligated to follow state law as he interpreted it.²⁴

In *Campbell*, the plaintiff, foreman for Daniel Oilfield Construction, Inc. was employed by the defendant, Shell Oil Co., to do general maintenance and corrective work on Shell Oil Company's property. As part of Mr. Campbell's work, he put alcohol into a pipe in order to thaw it out. He was inspecting this work when Peek, foreman for Shell working in the scope of his employment, negligently opened the valve in the pipe causing the fluid in the line to hit the plaintiff in the face and knock him down. As a result of this event, Mr. Campbell was injured.²⁵

The United States District Court, Billings Division, applying the rules of *Ashcraft*²⁶ and *Buerkle*²⁷ to the *Campbell* facts stated that it made no difference whether Shell Oil Company was or was not an independent contractor. The court stated:

employer shall be liable to pay all compensation under this act to the same extent as if the work were done without the intervention of such contractor. And the work so procured to be done shall not be construed to be "casual employment."

²¹R.C.M. 1947, § 92-204 in part provides:

Provided that whenever such employee shall receive an injury while performing the duties of his employment and such injury or injuries, so received by such employee, are caused by the act or omission of some persons or corporations other than his employer, or the servants or employees of his employer, then such employee, or in case of his death his heirs or personal representatives, shall, in addition to the right to receive compensation under the Workmen's Compensation Act, have a right to prosecute any course of action he may have for damages against such persons or corporations, causing such injury.

²²Buerkle v. Montana Power Co., *supra* note 16 at 60-61.

²³Campbell v. Shell Oil Co., 329 F. Supp. 846 (U.S.D.C. Mont. 1971).

²⁴Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

²⁵Campbell v. Shell Oil Co., *supra* note 23 at 846, 847.

²⁶Ashcraft v. Montana Power Co., *supra* note 11.

²⁷Buerkle v. Montana Power Co., *supra* note 16.

Under the rule of *Ashcraft*, if Daniel is an independent contractor, the plaintiff is barred by Section 92-438 from collecting in a negligence action from the general employer, Shell Oil Company. If, on the other hand, Daniel is not an independent contractor, then, under the rule of *Buerkle*, the defendant is immune from a common law liability suit as a third party under Section 92-604 and Section 92-204.²⁸

The court stated further that the effect of the *Buerkle* rule was to substitute the general employer for the plaintiff's immediate employer, where the independent contractor defense is not available to the general employer.²⁹ "The general employer's liability under this rule, however, is restricted to workmen's compensation insurance."³⁰ The court held that since Shell Oil required Daniel to carry workmen's compensation insurance, at the minimum, the common law liability suit of Mr. Campbell must fail.³¹

With these three cases in mind, it is evident that an injured employee cannot bring a common-law third party liability suit against his general employer where the employer complied with R.C.M. 1947, § 92-438.³² At most, the general employer will be liable to the extent of Workmen's Compensation where the "independent contractor" defense is not available.³³

Just nine days after receiving an adverse decision at the hands of the Judiciary, advocates of Section 16 proceeded to the Legislature.

LEGISLATIVE REMEDY

In 1965 the legislature amended R.C.M. 1947, § 92-438.³⁴ The amendment,³⁵ simply stated that if the principal employer complies with R.C.M. 1947, § 92-438 as amended, he pays no compensation claims to employees of independent contractors. The legislature in this amendment attempted to clarify the remedy of workmen's compensation as to employer-employee relationships. This amendment was by no means a unanimous measure and thus, opponents of the *Ashcraft* decision³⁶ introduced a bill in the 1971 Legislature, Senate Bill No. 331, to reverse the effect.³⁷ The bill introduced was entitled:

AN ACT TO AMEND SECTION 92-204, R.C.M. 1947, TO DEFINE THIRD PARTIES AGAINST WHOM INJURED WORKMEN MAY PROSECUTE CAUSES OF ACTION TO INCLUDE PRIME CONTRACTORS AND GENERAL CONTRACTORS AND

²⁸Campbell v. Shell Oil Co., *supra* note 23 at 848.

²⁹*Id.*

³⁰*Id.*

³¹*Id.* at 849.

³²R.C.M. 1947, § 92-438.

³³Campbell v. Shell Oil Co., *supra* note 23 at 849.

³⁴R.C.M. 1947, § 92-438.

³⁵*Ashcraft v. Montana Power Co.*, *supra* note 11.

³⁶*Id.*

OWNERS WHO HAVE NOT BECOME LIABLE FOR WORKMEN'S COMPENSATION BENEFITS UNDER SECTION 92-438, R.C.M. 1947.³⁸

The pertinent insertion was as follows:

Provided, that whenever such employee shall receive an injury while performing the duties of his employment and such injury or injuries, so received by such employee, are caused by the act or omission of some persons or corporation other than his employer, or the servants or employees of his employer, but including owners, prime contractors and general contractors who have not become liable to such employee for workmen's compensation benefits under the provisions of section 92-438, R.C.M. 1947, by reasons of the failure of such employee's immediate employer to come within the Workmen's Compensation Act, then such representatives, shall, in addition to the right to receive compensation under the Workmen's Compensation Act, have a right to prosecute any cause of action he may have for damages against such persons or corporations, causing such injury.³⁹

The amendment's obvious intent was to place the owner, prime contractor and general contractor in the category of third parties and thus subject them to third party liability suits. Senate Bill 331 was passed in the Senate by a roll call vote of twenty-nine to twenty-three.⁴⁰ The House of Representatives returned the bill to the Senate after adopting an adverse committee report which killed the legislation.

Once again thwarted, proponents of the common-law rights of injured workmen found themselves confronted with a unique opportunity. Montana's Constitutional Convention was preparing a new constitution to be voted on by the people of Montana.⁴¹ Recognizing this to be a final opportunity, they sought to obtain their goal by placing Section 16 into the Declaration of Rights.

CONSTITUTIONAL REMEDY

The official explanation mailed to the voters concerning Section 16 stated: "This section adds to the 1889 constitution by specifically granting to a person injured in employment the right to sue a third party causing the injury, except his employer or fellow employee when his employer provides coverage under workmen's compensation laws."⁴²

The Bill of Rights Committee, headed by the same counsel who argued in *Ashcraft*,⁴³ drafted Section 16 and made the following comments:

³⁸*Id.*

³⁹*Id.*

⁴⁰MONTANA SENATE JOURNAL 451 (1971).

⁴¹Official Text (1972), *supra* note 1.

⁴²*Id.*

⁴³Bill of Rights Committee Proposal, Vol. VIII, Montana Constitutional Convention, 1971-1972. Reported February 23, 1972. Committee members: Wade J. Dahood, Ch., Chet Blaylock, V.Ch., Bob Campbell, Dorothy Eck, Donald R. Foster, R. S. (Bob) Hanson, George H. James, Rachell K. Mansfield, Lyle R. Monroe, Marshall Murray, and Veronica Sullivan.

It is interesting to note that Mr. Dahood argued and lost *Ashcraft v. Montana Power Co.*, *supra* note 11, which is overruled by Section 16 of the Declaration of Rights contained under discussion.

. . . Under Montana law, as announced in the recent decision of *Ashcraft v. Montana Power Co.*, the employee has no redress against third parties for injuries caused by them if his immediate employer is covered under the Workmen's Compensation law. The Committee feels that this violates the spirit of the guarantee of a speedy remedy for all injuries of person, property or character. . . . The Committee urges that this is an abuse of the Workmen's Compensation Law and constitutes a misapplication of that law to protect persons who are negligent.⁴

The addition of Section 16 has a tremendous impact upon the current status of workmen's compensation law. The section, in effect, reverses the results of judicial interpretation and legislative action.

EFFECT

The guarded immunity from third party liability cherished by the general employer no longer exists. The effect of Section 16 is to provide an injured workman with an avenue of redress against a general employer, even if his employer be required to carry workmen's compensation insurance. The injured employee will be able to maintain a common law third party liability suit against his general employer. This additional right to sue will expose the general employer to litigation which he previously could have avoided. General employers' costs for legal assistance will increase. In addition, if the workman prevails, the general employer must bear the burden of an adverse judgment.

In theory, Section 16 stands for the proposition that all injured persons are guaranteed a full and speedy remedy for their injuries. This is a noble and just purpose, however, it remains to be seen how effectively this new avenue of redress can be utilized by injured employees.

CONCLUSION

Constitutional conventions meet infrequently and thus a constitutional remedy of this nature is rare. The tenacious advocates of Section 16 were presented with a unique opportunity and took advantage of it. The Constitutional Convention presented them with an opportunity to seek reform after having been first defeated by the judiciary and secondly by the legislature. As a consequence, Section 16 was drafted into the new Constitution. Montana's new constitution permits an injured employee to bring a common law third party suit against his general employer.