Limiting Statutory Employer Liability FOR WORKERS' COMPENSATION

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A recent administrative decision by Kentucky's Department of Workers' Claims holds important promise for transportation brokers facing a claim for workers' compensation payments as alleged statutory employers of transportation carrier employees.[1] In this case, the administrative law judge held that brokers Freightquote.com, Inc. ("Freightquote") and C2 Freight Resources, Inc. ("C2") were not statutory employers for workers' compensation purposes of an over-the-road truck driver employed by the carrier, Double H&S Enterprises, Inc. ("Double H&S").

In *Byrd*, plaintiff made a claim for workers' compensation arising out of injuries sustained while loading freight brokered by Freightquote and C2 to plaintiff's carrier employer, Double H&S. Because Double H&S carried no workers' compensation insurance covering the injuries, notwithstanding its contractual representations to the brokers to the contrary, the Kentucky Attorney General on behalf of the Commonwealth's Uninsured Employers' Fund ("Fund") brought Freightquote and C2 into the suit as alleged statutory employers of the plaintiff. Freightquote and C2 defended on the principal basis that, as brokers, they did not qualify for "up-the-ladder" statutory liability under Kentucky's applicable statutory scheme.

Under Kentucky workers' compensation law:

> A contractor who subcontracts all or any part of a contract and his or her carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter .... A person who contracts with another ... [t]o have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.[2]

In its briefing, the Fund recognized that Freightquote and C2 acted solely as transportation brokers in the transaction precipitating plaintiff's injuries. Nevertheless, the Fund argued the separate roles of broker and carrier carried no distinction for purposes of Kentucky workers' compensation law because each role was part of a larger, generalized "shipping business." Consequently, the Fund argued, the acts of carriage performed by Double H&S were a regular part of the business of the brokers because carriage constituted a necessary cog in the wheel of the shipping industry making the brokers' economic activity possible.

Freightquote and C2 maintained that Kentucky workers' compensation law and federal statutes and regulations recognizing the distinction between brokers and carriers prevented statutory employer status. The brokers pointed out the fallacy inherent in the Fund's characterization of a monolithic and expansive "shipping business" encompassing carriage, brokerage and any other roles required to move freight between points. Section 342.610(2) of the Kentucky statutes requires the work supporting statutory employer liability must be "a regular or recurrent part of the work of the trade, business, occupation, or profession" of the person to be charged as the statutory employer. The Fund had effectively inverted this concept in its argument, focusing not on the arrangement of transportation services that was the sole economic activity of the brokers, but rather on a larger industry (characterized by the Fund as the "shipping business" in order to name-check one of the terms used in the statute) within which the roles of broker and carrier are subsumed. In so doing, it ignored an unpublished but on-point Kentucky decision recognizing that the proper inquiry is not whether the alleged statutory employer's activity is a regular or recurrent part of a generalized

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industry segment, but whether the job causing the compensable injury was a regular or recurrent part of the alleged statutory employer's business.[3]

Freightquote and C2 also illuminated this inversion of the statute through analogy. As Freightquote argued, the activity of a transportation broker arranging the transport of freight through the services of a transportation carrier is not materially different from a travel agent arranging for the transport of a passenger by airplane. If the pilot suffered a knee injury trying to move about the cockpit during the flight booked by the travel agency, the pilot would not have recourse to the travel agency for his injuries – it would be the airline's sole responsibility. Changing the details from the movement of passengers to the movement of freight should make no difference in the outcome.

Finally, the brokers brought the weight of federal law to bear on the issue. Federal statutes and regulations define motor carriers and brokers separately and exclusively.[4] Further, federal regulations impose non-delegable duties on carriers to exercise control over the drivers and vehicles they employ.[5]

Based on these authorities, the administrative law judge denied application of statutory employer liability to Freightquote and C2 and, in the process, saved the brokers from the crushing burden of insuring against work-related injuries suffered by employees of all the carriers contracted with the brokers. This administrative decision provides transportation brokers with a favorable precedent and additional ammunition against liability for workers' compensation for injured employees of carriers in "up-the-ladder" states with statutory schemes similar to Kentucky. The focused nature of the inquiry on the business of the broker rather than an amorphous concept of an "industry" and the guidance of federal laws and regulations that strictly define the separate roles of broker and carrier provide powerful arguments against liability as a statutory employer.

Endnotes

1. *Byrd v. Double H&S Enterprises, Inc.*, DWC No. 2009-00583 (July 18, 2011).
2. Ky. Rev. Stat. § 342.610(2).
3. *See City of Salyersville v. Smith*, No. 2006-CA-000883-WC (Ky. App. Dec. 1, 2006). A case from the neighboring state of Arkansas also provided persuasive authority on this issue for the administrative law judge. *See Transplace Stuttgart, Inc. v. Carter*, 255 S.W.3d 878 (Ark. App. 2007).
4. *See* 49 U.S.C. § 13102(14) (defining carrier); 49 U.S.C. § 13102(2) (defining broker); 49 C.F.R. § 371.2(a).
5. *See, e.g.*, 49 C.F.R. §§ 382-383, 390-396. Case law recognizes these same distinctions. *See, e.g., Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004); *Transplace Stuttgart, Inc.*, 255 S.W.3d 878.