

**MILL STREET CHURCH OF CHRIST** and State Automobile Mutual Insurance Company, Petitioners,

v.

Samuel J. HOGAN and Workers' Compensation Board, Respondents

Court of Appeals of Kentucky

March 2, 1990.

HOWARD, Judge.

Mill Street Church of Christ and State Automobile Mutual Insurance Company petition for review of a decision of the New Workers' Compensation Board [hereinafter "New Board"] which had reversed an earlier decision by the Old Workers' Compensation Board [hereinafter "Old Board"]. The Old Board had ruled that Samuel J. Hogan was not an employee of the Mill Street Church of Christ and was not entitled to any workers' compensation benefits. The New Board reversed and ruled that Samuel Hogan was an employee of the church.

Samuel Hogan filed a claim for workers' compensation benefits for an injury he received while painting the interior of the Mill Street Church of Christ on December 15, 1986. In 1986, the Elders of the Mill Street Church of Christ decided to hire church member, Bill Hogan, to paint the church building. The Elders decided that another church member, Gary Petty, would be hired to assist if any assistance was needed. In the past, the church had hired Bill Hogan for similar jobs, and he had been allowed to hire his brother, Sam Hogan, the respondent, as a helper. Sam Hogan had earlier been a member of the church but was no longer a member. The church at the time the painting project was undertaken, had switched to an Elder form of church government. At the time Bill Hogan was employed for other projects, the church operated under a congregational form of church government.

Dr. David Waggoner, an Elder of the church, soon contacted Bill Hogan, and he accepted the job and began work. Apparently Waggoner made no mention to Bill Hogan of hiring a helper at that time. Bill Hogan painted the church by himself until he reached the baptistry portion of the church. This was a very high, difficult portion of the church to paint, and he decided that he needed help. After Bill Hogan had reached this point in his work, he discussed the matter of a helper with Dr. Waggoner at his office. According to both Dr. Waggoner and Hogan, they discussed the possibility of hiring Gary Petty to help Hogan. None of the evidence indicates that Hogan was told that he had to hire Petty. In fact, Dr. Waggoner apparently told Hogan that Petty was difficult to reach. That was basically all the discussion that these two individuals had concerning hiring a helper. None of the other Elders discussed the matter with Bill Hogan.

On December 14, 1986, Bill Hogan approached his brother, Sam, about helping him complete the job. Bill Hogan told Sam the details of the job, including the pay, and Sam accepted the job. On December 15, 1986, Sam began working. A half hour after he began, he climbed the ladder to paint a ceiling corner, and a leg of the ladder broke. Sam fell to the floor and broke his left arm. Sam was taken to the Grayson County Hospital Emergency Room where he was treated. He later was under the care of Dr. James Klinert, a surgeon in Louisville. The church Elders did not know that Bill Hogan had approached Sam Hogan to work as a helper until after the accident occurred.

After the accident, Bill Hogan reported the accident and resulting injury to Charles Payne, a church Elder and treasurer. Payne stated in a deposition that he told Bill Hogan that the church had insurance. At this time, Bill Hogan told Payne the total number of hours worked which included a half hour that Sam Hogan had worked prior to the accident. Payne issued Bill Hogan a check for all of these hours. Further, Bill Hogan did not have to use his own tools and materials in the project. The church supplied the tools, materials, and supplies necessary to complete the project. Bill purchased needed items from Dunn's Hardware Store and charged them to the church's account.

It is undisputed in this case that Mill Street Church of Christ is an insured employer under the Workers' Compensation Act. Sam Hogan filed a claim under the Workers' Compensation Act. . . . The New Board . . . entered its final order in favor of Sam Hogan on January 20, 1989 [, based on the premise that Bill Hogan had the authority to hire Sam Hogan as an employee of the Church; therefore, Sam was entitled to benefits as a covered employee of the Church.] . . . The Petitioners now ask this Court to review and reverse the decision of the New Board.

\* \* \* [T]here was no real dispute as to the essential facts of this case. All of the parties seem to agree as to what the Elders decided, what had occurred in the past, and what Bill Hogan had been told during this specific employment. In this case, the New Board was reviewing the Old Board's decision to determine if the agreed facts established that Bill Hogan was acting as an agent for Mill Street Church of Christ and had the implied power to hire his brother, Sam Hogan, as a helper. \* \* \*

Petitioners argue that the New Board erred by finding that a person hired under implied authority of an agent could be an employee for the purposes of this statute. The statute does not support petitioners' assertion. \* \* \* We find that the Mill Street Church of Christ had knowledge that Bill Hogan would have to hire a helper as in the past. Since he had hired his brother in the past, and had not been instructed differently this time, the church should be imputed with the knowledge if it is found that its agent had the authority to hire a helper. The trend has been to favor the award of compensation based upon a finding of employment.

As part of their argument, petitioners argue the New Board also erred in finding that Bill Hogan possessed implied authority as an agent to hire Sam Hogan. Petitioners contend there was neither implied nor apparent authority in the case at bar.

It is important to distinguish implied and apparent authority before proceeding further. Implied authority is actual authority circumstantially proven which the principal actually intended the agent to possess and includes such powers as are practically necessary to carry out the duties actually delegated. *Estell v. Barrickman*, Ky.App., 571 S.W.2d 650 (1978). Apparent authority on the other hand is not actual authority but is the authority the agent is held out by the principal as possessing. It is a matter of appearances on which third parties come to rely. *Estell v. Barrickman, supra*.

Petitioners attack the New Board's findings concerning implied authority. In examining whether implied authority exists, it is important to focus upon the agent's understanding of his authority. It must be determined whether the agent reasonably believes because of present or past conduct of the principal that the principal wishes him to act in a certain way or to have certain authority. 3 Am.Jur.2d, Agency § 75. The nature of the task or job may be another factor to consider. Implied authority may be necessary in order to implement the express authority. 3 Am.Jur.2d, Agency § 75, *supra*. The existence of prior similar practices is one of the most important factors. Specific conduct by the principal in the past permitting the agent to exercise similar powers is crucial.

The person alleging agency and resulting authority has the burden of proving that it exists. . . . Agency cannot be proven by a mere statement, but it can be established by circumstantial evidence including the acts and conduct of the parties such as the continuous course of conduct of the parties covering a number of successive transactions. . . . Specifically one must look at what had gone on before to determine if the agent had certain authority. . . . If considering past similar acts done in a similar manner, it is found that the present action was taken with the apparent scope of the agent's authority, the act is binding upon the principal. . . .

\* \* \*

In considering the above factors in the case at bar, Bill Hogan had implied authority to hire Sam Hogan as his helper. First, in the past the church had allowed Bill Hogan to hire his brother or other persons whenever he needed assistance on a project. Even though the Board of Elders discussed a different arrangement this time, no mention of this discussion was ever made to Bill or Sam Hogan. In fact, the discussion between Bill Hogan and Church Elder Dr. Waggoner, indicated that Gary Petty would be difficult to reach and Bill Hogan could hire whomever he pleased. Further, Bill Hogan needed to hire an assistant to complete the job for which he had been hired. The interior of the church simply could not be painted by

one person. Maintaining a safe and attractive place of worship clearly is part of the church's function, and one for which it would designate an agent to ensure that the building is properly painted and maintained.

Finally, in this case, Sam Hogan believed that Bill Hogan had the authority to hire him as had been the practice in the past. To now claim that Bill Hogan could not hire Sam Hogan as an assistant, especially when Bill Hogan had never been told this fact, would be very unfair to Sam Hogan. Sam Hogan relied on Bill Hogan's representation. The church treasurer in this case even paid Bill Hogan for the half hour of work that Sam Hogan had completed prior to the accident. Considering the above facts, we find that Sam Hogan was within the employment of the Mill Street Church of Christ at the time he was injured.

The decision of the New Workers' Compensation Board is AFFIRMED.