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THE STATUS OF AN INDEPENDENT CONTRACTOR UNDER THE MISSOURI WORKMEN'S COMPENSATION LAW

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INTRODUCTION

One of the most difficult problems encountered in the law is determining under what circumstances a workman is an employee and under what circumstances he is an independent contractor. This legal problem exists not only in the field of workmen's compensation law but in other areas as well. For example, in the field of tort law the problem arises in connection with the vicarious liability of the alleged master for the torts of his alleged servant. This discussion, however, will be confined to the workmen's compensation field since the problem receives special and distinctive treatment from the courts in this area. A large portion of this article will be concerned with a review of the Missouri appellate courts' attempts to define clearly and delineate the term independent contractor.

I. EMPLOYEE OR INDEPENDENT CONTRACTOR?

No definition of independent contractor is found in the Missouri Workmen's Compensation Law and before a discussion of the various fact situations upon which the Missouri courts have passed, it is desirable to present a simple definition. An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of the work.[1] The Supreme Court of Missouri has quoted this definition with approval.[2]

Even though Missouri's statutes fail to define independent contractor, there do appear definitions of an employer and an employee which indicate

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1. BLACK, LAW DICTIONARY (4th ed. 1951).

2. Vaseleou v. St. Louis Realty & Sec. Co., 344 Mo. 1121, 130 S.W.2d 538 (1939).

the factors which make up the employer-employee relationship and this might be termed definition by exclusion. An employee, under Missouri law, is every person *in the service* of an employer under any contract of hire, express or implied, oral or written, or under any appointment or election.[3] An employer is every person, partnership, association, corporation, trustee, receiver, the legal representative of a deceased employer and every other person *using the service* of another for pay.[4] The Missouri courts have indicated the key word in the definitions, and the one which actually establishes the employer-employee relationship, is *service.* The courts have interpreted the word to mean *controllable* service.[5] This interpretation or connotation probably stems from the phrase "using the service" found in the definition of an employer.

Mention is made of independent contractors in only section 287.040 of the Missouri statutes. Subsection one thereof establishes liability under the law on the part of one having work done under contract on or about his premises and which work is an operation of the usual business which he carries on there.[6] The coverage extends to the contractor, his sub-contractors and their employees for injuries or death arising out of this particular class of work. Subsection three exempts from the operation of subsection one the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor and makes the latter the employer of the employees of his sub-contractors and their sub-contractors.[7] The Supreme Court of Missouri in considering this section has stated that the overall purpose of the workmen's compensation law as shown by the title and provisions was to lighten the loss sustained by the injured workman and his dependents from work-connected accidents, regardless of fault. With this in mind, the legislature chose to select and specify independent contractors and their subordinates as being entitled to benefits under the law when the work was done on the employer's premises. The court reasons from this specification that independent contractors not coming within the particular class designated and not mentioned or defined elsewhere in the law are necessarily excluded from benefits.[8]

Therefore, under certain circumstances, an independent contractor is covered by the provisions of the workmen's compensation law and takes on

3. § 287.020(1), RSMo 1959.
4. § 287.030, RSMo 1959.
5. Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000, 82 S.W.2d 909 (1934).
6. § 287.040(1), RSMo 1959.
7. § 287.040(3), RSMo 1959.
8. Maltz v. Jackoway-Katz Cap Co., *supra* note 5.

the status of a "statutory employee" while in all other cases he is not afforded protection and is excluded from the benefits of the provisions.

In each compensation case reaching the courts, one of the points to be decided is whether the injured party is an employee or an independent contractor, and if the latter, does he fit into that particular category of independent contractors classified as statutory employees. The courts generally review only questions of law, and given findings of fact by the Commission or undisputed facts, they may declare as a matter of law whether one is an independent contractor or merely a servant.[9] The factual elements upon which the courts base their declaration of law are: the extent of control which the alleged employer may exercise over the details of the work by the agreement under which services are performed; the actual exercise of control; whether the person performing the service is engaged in a distinct and independent calling requiring the skill of one specially trained; whether the work is usually done under the direction of an employer or by a specialist without supervision; the length of time for which the person is hired; the right to discharge the worker at any time prior to completion of the work; the method of payment, whether by time or by job without reference to the time consumed in performing the service; whether the alleged employer or the workman supplies the necessary tools, machinery and appliances; whether the work is a part of the regular business of the alleged employer; whether the alleged employer has the right to hire, discharge and determine the pay of others who assist the worker in the performance of the work, and whether the alleged employer directs the details of the work performed by those assisting said worker.[10]

Although the court which set out the foregoing factors said no one of them was controlling but each was relevant to the issue, the Missouri courts have time after time singled out the element of control as being of utmost importance in determining the existing status. All other matters which may indicate the relationship of independent contractor are largely a consequence of the lack of control of the employer except, of course, as to the final result.[11] The mere reservation of the right, whether exercised or not, by the party who is having the work done, to supervise and control the work of the other party as to the details of how it shall be performed is the vital test.[12]

9. Rutherford v. Tobin Quarries, Inc., 336 Mo. 1171, 82 S.W.2d 918 (1935).
10. Lawrence v. William Gebhardt, Jr. & Son, 311 S.W.2d 97 (St. L. Ct. App. 1958).
11. Horn v. Asphalt Prod. Corp., 131 S.W.2d 871 (St. L. Ct. App. 1939).
12. Fisher v. Hennessey, 329 S.W.2d 225 (K.C. Ct. App. 1959); Hackler v. Swisher Mower & Mach. Co., 284 S.W.2d 55 (K.C. Ct. App. 1955); Horn v. Asphalt Prod. Corp., *supra* note 11.

A logical corollary of the right to control, and one of nearly equal significance, is the unrestricted right of the employer to end the particular service whenever he chooses without regard to the final result of the work itself;[13] in other words, the right and power to discharge for proper cause.[14]

As indicated the most significant test in determining whether the one doing the work is an employee or an independent contractor is the right of control retained by the employer regardless of whether this right is actually exercised. If the right to control the details of the work is retained, even though not exercised, it is an employer-employee relationship. If, however, the only control is as to the final result, the workman assumes the status of an independent contractor.

As pointed out, the power to terminate the relationship at any stage of the work also has great weight. If the relationship can be terminated by either party at any stage of the work without further rights or remedies on either side, an employer-employee relationship is indicated. If additional rights exist after termination, the status of the one doing the work is more consistent with that of an independent contractor.

Other factors, which by themselves may not be determinative, are important. Payment by the hour or piece is evidence of an employer-employee relationship, while payment by the job is generally found where the independent contractor status exists. Where the one doing the work has the right to employ his own assistants, to supervise their activities and to substitute another to do the work, the independent contractor relationship is usually found. However, these factors must be considered along with others, such as the hours or days to be worked, the restriction to a certain territory, or lack thereof, who furnishes the equipment or tools to be used, who sets the price to be obtained for a product being sold, and who furnishes the transportation to be used by the worker. These factors are important chiefly in determining the existence of a right to control, the primary test.

There is another definition which the Missouri supreme court has cited with approval and adopted as an aid in determining the status of an injured workman.[15] A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master, while an independent contractor is a person who contracts with another to do something for him, but who is not controlled by the other nor subject to

13. Maltz v. Jackoway-Katz Cap Co., *supra* note 5.
14. Bernat v. Star-Chronicle Pub. Co., 84 S.W.2d 429 (St. L. Ct. App. 1935).
15. McKay v. Delico Meat Prod. Co., 351 Mo. 876, 174 S.W.2d 149 (1943).

the other's right to control with respect to his physical conduct in the performance of the undertaking.[16]

In order to best illustrate the application of the preceding definitions and tests, certain cases with which Missouri appellate courts have dealt are worthy of mention.

A frequent source of difficulty is the situation where the owner of a truck holds himself and his truck out for hire. In one case, the truck owner was paid on a ton-mileage basis, could substitute another driver for himself and was to take care of expenses incident to the operation and maintenance of his truck. He was to be paid once a week and he also employed other truck drivers, but the latter were paid by the party hiring the truck. The court said this evidence was consistent with the relationship of an independent contractor to the one hiring him but held the man to be an employee. The evidence further revealed that the company superintendent told the drivers what material to haul, what time they should leave the plant in the morning, when to oil their truck beds, to cover their loads with a tarpaulin, and when to leave with their last load in the evening. This was found a sufficient exercise of a right to control the details of the work to create an employer-employee relationship.[17]

Where an electrician, who had admittedly done some work on a job as an independent contractor, did work on the same job for which he was paid by the hour and which work could be terminated by the alleged employer if he was seen doing his work improperly or using shoddy material, it was held this was a sufficient right of control to make the relationship one of employer-employee. The fact that no such control was exercised was not determinative, the ultimate test being the right to do so.[18]

One interesting Missouri case held the claimant to be neither an employee nor an independent contractor. The injured party operated a sawmill owned by the company from which he sought compensation. The St. Louis Court of Appeals held the claimant was carrying on his own manufacturing business and was merely a lessee of the sawmill and was not entitled to compensation as an employee nor as one of that class of independent contractors covered by the compensation law.[19]

The claimant was held to be an independent contractor where he was paid no salary and no drawing account, but was to receive a commission on

16. RESTATEMENT (SECOND), AGENCY § 2 (1958).
17. Horn v. Asphalt Prod. Corp., *supra* note 11.
18. Fisher v. Hennessey, *supra* note 12.
19. Ramsey v. Gross & Janes Co., 241 S.W.2d 777 (St. L. Ct. App. 1951).

sales made. He was to furnish his own transportation, pay his own expenses and was not required to work on any particular day. The only restrictions were as to the territory he could cover and the price he could charge for the product to be sold and the court held the restrictions to be as consistent with an independent contractor status as with an employer-employee status. Such restrictions are common today even between manufacturers and merchants dealing in various kinds of products.[20]

In a somewhat similar case, a salesman was restricted as to territory but set his own hours of work and paid only for those products sold. He turned over 65 per cent of the sale price and kept the rest for himself, returning those products which were unsold. He was held to be an independent contractor. The claimant was an ice cream vendor and the court expressed its opinion that the legislature did not intend the workmen's compensation law to cover peddlers of chewing gum, shoe laces, ice cream and other small articles, since making them employees would subject them to the social security and unemployment compensation laws.[21]

II. The Statutory Employee—Section 287.040

Several cases, some of which are here discussed, have held an independent contractor entitled to compensation by virtue of the statutory employment section of the law.[22] Those persons claiming benefits as independent contractors must meet the specific statutory requirements. Thus, the work must be done on the premises of the one having the work done, and it must be an operation of the latter's usual business carried on at that place. The coverage does not extend to the independent contractor working for the owner of premises upon which improvements are being erected, demolished, altered or repaired. However, the principal contractor in this latter situation does become a statutory employer of the employees of his subcontractors, but the subcontractor himself is not mentioned as being covered as he is in subsection one of the provision. There is no Missouri case which decides whether the subcontractor who is an independent contractor himself becomes a statutory employee of the principal contractor, erecting, altering or repairing improvements for the owner of the premises. No opinion as to the possible holding if such a fact situation presented itself is offered, but again, it is to be noted that subsection three does not list the subcontractor as covered as does subsection one.

20. Hackler v. Swisher Mower & Mach. Co., *supra* note 12.
21. Garcia v. Vix Ice Cream Co., 147 S.W.2d 141 (St. L. Ct. App. 1941).
22. § 287.040, RSMo 1959.

In the statutory employment cases, the injured party is admittedly an independent contractor, and the problems arise as to what constitutes premises, improvements and usual business. A public highway has been held not to be the premises although this was a place where the work required an independent contractor to be.[23] In another case the Supreme Court of Missouri said that "premises" contemplates any place under the exclusive control of the employer which is used for a substantial period of time and where the employer's usual business is being carried on or conducted. The court then excluded a railroad right of way where a car of light poles was being unloaded.[24] The claimant was held to be simply an invitee on the premises of the railroad and did not have exclusive possession of the premises to which he was invited for business purposes. Merely being at a place were his work requires him to be is not enough to make an independent contractor a statutory employee; he must have exclusive possession and control of the place, at least for a time.

As to what constitutes an operation of the usual business carried on by the one having the work done, Missouri courts have reached different results in cases involving the same type of work. Where the employee of an independent contractor brought a common law action against a grocery company for an injury received while washing windows, the latter activity was held to be neither an operation nor an event in the usual course of the business.[25] However, a window washer seeking compensation benefits from a theater building was successful, the court saying that window washing was an integral and necessary part of that business.[26] Perhaps the type of business for which the windows were being washed was the determinative factor. Where the injured workman sought compensation benefits, as he did in the theater building case, perhaps the court was guided by the statutory provisions that the act should be liberally construed.[27] A review of workmen's compensation decisions indicates that this means a construction to benefit the largest possible class of persons and not one that gives a claimant's evidence greater weight than the employer's.[28] This liberal construction has been utilized by Missouri courts whether the problem was one of finding the claimant to be an employee rather than an in-

23. Rutherford v. Tobin Quarries, Inc., *supra* note 9.
24. State *ex rel.* Potashnick v. Fulbright, 350 Mo. 858, 169 S.W.2d 59 (1943).
25. Dixon v. General Grocery Co., 293 S.W.2d 415 (Mo. 1956).
26. Viselli v. Missouri Theatre Bldg. Corp., 361 Mo. 280, 234 S.W.2d 563 (1950).
27. § 287.800, RSMo 1959.
28. Dost v. Pevely Dairy Co., 273 S.W.2d 242 (Mo. 1954).

dependent contractor or finding him to be in that class of independent contractors covered by the act. There have been cases in which the court did not have to decide if the man was an employee or an independent contractor, since if he was an employee he would be entitled to benefits and if an independent contractor he would come under the law also since he met the statutory employment requirements.[29]

The laying of water pipes has been held to be the erection of an improvement,[30] as has the installation of a tank for chemicals used by a laundry,[31] but not the monthly servicing of an elevator,[32] so that compensation was denied in the first two situations and allowed in the latter.

It has been held that the owner of premises on which improvements are being erected is protected from the operation of the statutory employment section even though he is a speculative builder.[33] This decision is believed to be contrary to the legislative intent since the person is in the business of building homes and is not an individual homeowner which the statute was designed to protect. The court so admits but refuses to give any other construction to this subsection of the law.[34]

The statutory employment section of the law presents a real problem for the workmen's compensation insurance carrier which is worthy of mention although of little concern to the practicing attorney. The carriers base their premium charges at least in part on the size of the employer's payroll. The independent contractor would not be carried on the payroll of the one employing him, and so ordinarily there is no premium collected for him until after he has been injured and benefits allowed him. Then the insurance company can pick up his income from an audit of the employer's books and an additional premium may be collected. In the meantime, coverage has been afforded to an "employee" for whom no premium was charged. The employees of an independent contractor are not usually a problem for the carrier since the principal contractor can require that all of his subcontractors furnish him with a certificate of workmen's compensation insurance before allowing them to commence their work. However, this does not cover the subcontractor himself.

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29. Montgomery v. Mine La Motte Corp., 304 S.W.2d 885 (Mo. 1957); Cates v. Williamson, 117 S.W.2d 655 (St. L. Ct. App. 1938).
30. Allen v. Jackson County Sav. & Loan Ass'n, 232 Mo. App. 1098, 115 S.W.2d 7 (K.C. Ct. App. 1938).
31. State *ex rel.* Long-Hall Laundry & Dry Cleaning Co. v. Bland, 354 Mo. 97, 188 S.W.2d 838 (1945) (en banc).
32. Kennedy v. J. D. Carson Co., 149 S.W.2d 424 (St. L. Ct. App. 1941).
33. Bobbitt v. Ehlers, 131 S.W.2d 900 (St. L. Ct. App. 1939).
34. § 287.040(3), RSMo 1959.

III. Conclusion

As the discussion above indicates, the principal difference between an independent contractor and an employee is that the latter is subject to the right of control by his employer. This does not require an exercise of the right but simply its existence. The independent contractor is not ordinarily afforded the protection and benefits of the workmen's compensation law but where he meets the specific requirements of working (1) on the employer's premises and (2) in an operation of the usual business carried on there, he is covered. This is not true when the one employing him is the owner of the premises and improvements are there being demolished, erected, altered or repaired, in which event, the independent contractor himself, again loses the benefits of the act.