Workmen's Compensation - Master and Servant - What Standards Determine Whether One Rendering Services for Another Is a Servant or an Independent Contractor

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Workmen's Compensation—Master and Servant—What Standards Determine Whether One Rendering Services for Another Is a Servant or an Independent Contractor.—The Wisconsin Industrial Commission awarded a wife compensation for the death of her husband on the ground that he was the plaintiffs' servant and was acting as such when he was killed in a grade-crossing collision. The deceased was employed by the plaintiffs' printing company to solicit subscribers. He was assigned to a definite territory, furnished with copies of the publication and subscription blanks, and was directed to collect money for subscriptions he had solicited. He was directed as to the use and manner of filling blanks, but was given no directions as to where, when, how or whom he should solicit. He was required to check in at the end of each day's work and to report promptly the names of new subscribers. He also was required to turn in one-half of the money he had collected, being authorized to retain the balance as a commission. Deceased furnished his own automobile and paid his own expenses, receiving no advances of money from the plaintiffs.

Held, on appeal, that the deceased had been an independent contractor. Award vacated, three justices dissenting. The principal test to be applied in determining whether one rendering services for another is a servant or an independent contractor is whether the employer has the right to control the details of the work. Other things are to be considered, however, such as the place of work, time of employment, method of payment and the right of summary discharge of employees. Huebner et al. v. Industrial Commission et al., 234 Wis. 239, 290 N.W. 145 (1940).

Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work. If he is under the control of the employer he is a servant; if not, he is an independent contractor. Kohnan v. Industrial Commission, 219 Wis. 139, 262 N.W. 622 (1935); Uppington v. New York, 165 N.Y. 222, 59 N.E. 91 (1901); Moody v. Industrial Accident Commission, 204 Cal. 668, 269 Pac. 542 (1928).

However, every contract for work to be done reserves to the employer a certain degree of control enabling him to see that the contract is carried out. Thus, the retention by the employer of the right to inspect the work of a contractor as it progressed for the purpose of determining whether it was completed according to the plans and specifications prescribed, the contract providing that work should be done "under the direction" and "subject to the approval" of the employer, did not operate to create a master-servant relationship. Smith v. Milwaukee Builders & Telephone Exchange, 91 Wis. 360, 64 N.W. 1041 (1895); Arthur v. Marble Rock Consolidated School District, 209 Iowa 280, 228 N.W. 70 (1929); Salmon v. Kansas City, 241 Mo. 14, 145 S.W. 16 (1912). Where a contract for cutting and delivery of timber provided that work was to be done under the supervision and direction of the employer, and in the exercise of that right the employer sometimes directed workmen to cut logs longer, it was concluded that a master-servant relationship did not result. Medford Lumber Co. v. Industrial Commission, 197 Wis. 35, 221 N.W. 390 (1928). An automobile salesman was shown to have been an independent contractor where, although he was required to report each morning at a specified hour to begin work, other factors showed that he was free from such control as to render him a servant. James v. Tobin-Sutton Co., 182 Wis. 36, 195 N.W. 848 (1923). The mere right of an employer to refuse acceptance of the performance of a particular job if incomplete or defective did not constitute such control as to render the relationship that of master and servant. J. Romberger Co. v. Industrial Commission, 234 Wis. 226, 290 N.W. 639 (1940). Nor, did the right to terminate the con-
tract and let it to someone else if not properly performed, have that effect. *Solberg v. Schlosser*, 20 N.D. 307, 127 N.W. 91 (1910).

The fact that the employer reserves the right to reject improper materials is not, of itself, such a reservation of control as to render the one performing the work a servant. *Fitzpatrick v. The Chicago and Western Indiana Railroad Co.*, 31 Ill. App. 649 (1889); *Uppington v. New York*, supra. The relationship of master and servant is not inferable from a reservation of powers which do not deprive the contractor of his right to do the work according to his own initiative so long as he does it in accordance with the contract. *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593, 106 N.E. 365 (1914); *Simmons v. Murray*, 209 Mo. App. 248, 234 S.W. 1009 (1921); *Uppington v. New York*, supra. An independent contractor is one who, exercising an independent employment, contracts to do a certain work according to his own methods without being subject to the control of his employer except as to the ultimate result or product of his work. *Madix v. Hochgreve Brewing Co.*, 154 Wis. 448, 143 N.W. 189 (1913).

Whether one is an independent contractor or a servant depends not on the exercise of control but upon the right of control by the employer under the contract of employment. *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N.W. 816 (1917); *Barnes v. Real Silk Hosiery Mills*, 341 Mo. 563, 108 S.W. (2d) 58 (1937). Thus, where there was nothing in the contract to deprive the employer of his right of control it was held that a master-servant relationship was created although the employer did not exercise his right of control because of his confidence in the superior ability and knowledge of the employee in the prosecution of the work. *Habrich v. Industrial Commission*, 200 Wis. 248, 227 N.W. 877 (1929). Right of control may also appear as the determining standard where there is no necessity for the exercise thereof. Where an employer did not, in fact, constantly supervise or direct, in detail, the work of one employed to cut trees in the manner directed by the employer, the workman was held to be a servant. In view of the simple nature of the work, there was no occasion for detailed directions or constant supervision, although the employer had the right to control the details and not merely the ultimate result. *Allaby v. Industrial Commission*, 200 Wis. 611, 229 N.W. 193 (1930). Where one formerly employed by a town as a trucker was passing over a bridge under repair and was requested by the town chairman to get some reinforcing irons urgently needed, being instructed only as to the number of irons required and the necessity for haste, he was held to be a servant, although there was no exercise of control of details. There was no necessity for such exercise of control due to the very nature of the thing to be done. *Eagle v. Industrial Commission*, 221 Wis. 166, 266 N.W. 274 (1936).

The right of control as to the manner of doing the work as distinguished from control of the ultimate result is the principal consideration in determining whether an employee is an independent contractor or a servant. Thus, where one was employed to sell sewing machines, and the company reserved the right to prescribe and regulate the manner in which he was to do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive, he was held to be a servant rather than an independent contractor. *Singer Manufacturing Co. v. Rahn*, 132 U.S. 518, 10 Sup. Ct. 175, 33 L.Ed. 440 (1889).

The cases support the proposition that an independent contractor may be assigned to a definite territory. *Kruse v. Weigand*, 204 Wis. 195, 235 N.W. 426 (1931); *Kassela v. Hoseth*, 217 Wis. 115, 258 N.W. 340 (1934). In the principal case the deceased was assigned to a definite territory within which to solicit subscriptions, but he was held to be an independent contractor. Other facts showed
an absence of such control of the details of the work by the employer as would render the deceased a servant.

The exercise of dominion by the employer over the premises where the work is being performed in connection with other surrounding circumstances of control may be sufficient to render the workman a servant. Jefferson v. Jameson & Morse Co., 165 Ill. 138, 46 N.W. 272 (1896). When, however, the employer surrenders to the person employed entire control of the premises where the work is being performed, it tends very strongly to show the latter's independence. Knicely v. West Virginia Midland Railroad Co., 64 W.Va. 278, 61 S.E. 811 (1908); Scammon v. Chicago, 25 Ill. 424, 79 Am. Dec. 334 (1861).

As a general rule independent contractors furnish labor, materials, tools and appliances for doing the work, while mere servants generally use the means afforded by the master. Whitney v. Clifford, 46 Wis. 138, 49 N.W. 835 (1879); Rankel v. Buckstaff-Edwards Co., 138 Wis. 442, 120 N.W. 269 (1909); Madix v. Hochgreve Brewing Co., supra; J. Romberger Co. v. Industrial Commission, supra. Whether the contractor or employer furnishes labor and appliances is not, in itself, decisive of the question of independence. What is of importance, however, is whether the contractor or employer has the right to dictate the particular manner in which the appliances shall be used and the laborers shall do their work. Postal-Telegram-Cable Co. v. Murrell, 180 Ky. 52, 201 S.W. 462 (1918); City of Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. St. Rep. 408 (1878).

The fact that the compensation of one subject to the general direction of an employer is fixed on the basis of the amount of work done rather than on the amount of time spent is not controlling in determining whether such a one is a servant or an independent contractor. Komula v. General Accident, Fire & Life Assurance Corporation Ltd. of Perth, Scotland, 165 Wis. 520, 162 N.W. 919 (1917); Whitney v. Clifford, supra. Where the contract is such, however, as to call for the performance of an entire piece of work at a specified price such a fact tends to show an independent contractor relationship. Habrich v. Industrial Commission, supra.

Of further importance in determining the nature of the relationship is the employer's right to terminate it. The right to terminate the contract and let the work to some one else if not properly performed does not necessarily make the contractor a servant but may indicate a control of the ultimate result. Blumb v. Kansas City, 84 Mo. 112, 54 Am. St. Rep. 87 (1884); Good v. Johnson, 38 Colo. 440, 88 Pac. 439 (1907). The power to terminate the contract at any time, however, irrespective of a good cause for doing so indicates a master-servant relationship. Singer Manufacturing Co. v. Rahn, supra; Showers v. Lund, 123 Neb. 56, 242 N.W. 258 (1932); Tiffin v. McCormack, supra.

One of the basic elements of an independent contractor relationship is the fact that the contractor has an independent business or occupation. Bodwell v. Webster, 98 Neb. 664, 154 N.W. 229 (1915). Thus a manufacturer of shingles was held to be an independent contractor because he was following a recognized independent calling. Whitney v. Clifford, supra. Where the death of a tenant was caused by dangerous gas introduced into a rented building by one engaged to exterminate bedbugs, the landlord who obtained his services was held not liable because the exterminator was an independent contractor, being engaged in an independent occupation. Medley v. Trenton Investment Co., 205 Wis. 30, 236 N.W. 713 (1931).

In determining whether an independent contractor or a master-servant relationship exists, the fact that the employer carries liability insurance on his em-
ployees is of evidentiary value in showing that the employer regards them as servants rather than independent contractors and tends to negative the independence of the contract with such employees. *Senpier v. Goemann*, 165 Wis. 103, 161 N.W. 354 (1917).

The foregoing considerations relate to an exclusive relationship between employer and employee. Where the employee, as a contractor, has men working under him, the control exercised over these sub-employees by the contractor's employer is of evidentiary value in determining whether such a contractor is a servant or an independent contractor. The fact that the contractor employs, pays, and has full power to control the workmen is virtually decisive of his independence. But, where an employer of a contractor exercised control over workmen employed to cut and pile logs under the charge of a contractor, it was held that the contractor was a servant rather than an independent contractor. *Senpier v. Goemann*, *supra*. Although the fact that wages of workmen employed by a contractor were paid by him tended to prove that he was an independent contractor, it did not possess a conclusive significance in that regard. *Rankel v. Buckstaff-Edwards Co.*, *supra*; *Madix v. Hochgreve Brewing Co.*, *supra*. One employed as a contractor who boarded and paid the workmen was held to be an employee, the evidence showing that such an arrangement was for convenience only. *Senpier v. Goemann*, *supra*. The right to compel contractors to discharge workmen who are incompetent, although tending to show the contractor's subserviency, does not indicate such control as to render the contractor a servant but rather indicates control of the ultimate result. *Blumb v. Kansas City*, *supra*; *Uppington v. New York*, *supra*. The employer's right, however, directly to discharge servants tends to show that the contractor is not independent. *Good v. Johnson*, *supra*; *Employers' Indemnity Co. v. Kelly Coal Co.*, 156 Ky. 74, 160 S.W. 914 (1913); *Cooper v. Seattle*, 16 Wash. 462, 47 Pac. 887 (1897).

Right of control as the general standard determines the legal relationship of the parties, and that right or its absence is revealed by the other features of the relationship; namely, the details of the work, that is, how it is done, the place of work, the time of the work, the method of payment, the furnishing of tools and materials, the nature of the occupation, the right of terminating the contract, the payment of liability insurance on the employee, and the employment, control and discharge of workmen.

No one of these features of the relationship ordinarily is determinative of its legal character. *Knicely v. West Virginia Midland Railroad Co.*, *supra*. It has been said—"The right to supervise, control, and direct the work is one of the tests for determining the nature of the relation which exists, but it is not the sole test. . . . No one fact can be relied on as a test or criterion, but the nature of the relation must be determined from all the evidence." *Barrett v. Selden-Brek Construction Co.*, 103 Neb. 850, 174 N.W. 866 (1919).

The right to control the details of the work, however, is conclusive of the master-servant relationship. The other standards of control, although not as absolute, tend to establish the particular relationship. They not only reveal the general standard of control which determines the legal relationship of the parties, but they are of evidentiary value in indicating the existence of the right to control the details of the work, which, in itself is conclusive of the relationship. In a particular situation the presence of these features will ordinarily be accompanied by the right of the employer also to control the details of the work.
In the principal case the deceased was assigned to a definite territory within which he was directed to solicit subscriptions and collect money therefor; he was furnished with materials and directed as to their use; he was required to report promptly and regularly the results of his efforts; and he was required to pay his own expenses. All these features tended to indicate a master-servant relationship, but it was concluded that the deceased was an independent contractor where other facts showed an absence of such control of the details of the work by the employer as characterizes a master-servant relationship.

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