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THE KENTUCKY WORKMEN'S COMPENSATION ACT:
EMPLOYEE V. INDEPENDENT CONTRACTOR

The scope of the term "employee" as used in KRS §342.005(1) is not defined by the statute. The section does enumerate certain occupations to be included or excluded from the act, but there is no attempt to establish a standard or test by which specific contractual relationships, under which work is done by one person for another, may be considered as within or without the statute.¹ Thus the question whether a particular worker is an employee within the meaning of the statute is left to be determined by the court. In this paper decisions of the Kentucky Court of Appeals will be considered in an endeavor to discover the test or tests used by the court in defining "employee". A conclusion will be sought as to whether the court has satisfactorily construed and implemented the term "employee" as used in the Kentucky Workmen's Compensation Act, the general purpose of which is to spread the burden of the cost of industrial injuries through the medium of a higher sales price for the product produced in the particular industry.²

KRS 342.004 directs that Chapter 342 be liberally construed on questions of law. Such a direction would enable the Kentucky court to take a position similar to that taken by the United States Supreme Court in *NLRB v. Hearst Publications, Inc.*³ and *United States v. Silk*⁴ where the Court conceived what some writers⁵ have called the economic reality doctrine. Larson, after first stating the orthodox attitude towards the "employee concept", explains the newer view by saying:

[J]ust as the 'servant' concept was tailored to fit a particular purpose—the definition of the scope of a master's vicarious tort liability—, so the term 'employee' when used in social and labor legislation should be interpreted in the light of the purpose of the legislation. That is, if the need being met by the legislation is regulation of collective bargaining, the term 'employee' may well include all workers for whom such bargaining is normal and appropriate; and if the evil aimed at by the legislation is insecurity confronting workers who may undergo temporary unemployment, the term 'employee' should include workers who, as a matter of economic reality, are subject to that hazard. . . .⁶

¹ Ky. Rev. Stat. §342.005 (1) (1960). (Hereinafter cited as KRS).

² See, 1 Larson, *Workmen's Compensation Law*, §2.20 (1952).

³ 322 U.S. 111 (1944).

⁴ 331 U.S. 704 (1947).

⁵ Jacob, "Are 'Independent Contractors' Really Independent?," 3 *De Paul L. Rev.* 23, 41 (1953); 1 Larson, *op. cit. supra* note 2, §43.41.

⁶ 1 Larson, *op. cit. supra* note 2, §43.41, at 628.

Congress later countered the *Hearst* case by enacting the Taft-Hartley Act⁷ which specifically excluded independent contractors from the definition of the term "employee" as used in the act.⁸ Any interpretation of the *Silk* case which purported to relax the common law rule was met by the so-called *Gearheart* resolution⁹ which amended the Social Security Act¹⁰ and the Internal Revenue Code of 1939.¹¹ The effect of this amendment seems to have been to reaffirm the restrictive view taken by the earlier cases.¹² A major argument for the *Gearheart* resolution was that the extension of social security coverage through the "economic reality" doctrine should have been put forth by Congress rather than the courts or the administrative bodies.¹³ Because of KRS 342.004 this argument would not arise if the Kentucky court were to adopt the "economic reality" doctrine as its test for construing the term "employee".¹⁴

A striking illustration of the flexibility of the economic reality doctrine is shown by a comparison of *Walling v. American Needle-crafts, Inc.*¹⁵ and *Glenn v. Beard.*¹⁶ The cases present almost identical facts but reach opposite results as to the finding of an employment status. It would seem that in reaching these apparently irreconcilable results the "economic reality" doctrine must have been accepted.

KRS 342.004 was enacted in 1950.¹⁷ The Kentucky court has mentioned the section while considering the general scope of the Workmen's Compensation Act,¹⁸ but there appears to have been only

⁷ Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 151-166 (1958).

⁸ Labor Management Relations Act, 1947, 61 Stat. 137, 29 U.S.C. 152 (3) (1958).

⁹ Employment Taxes and Social Security Benefits—Status Quo, 62 Stat. 438 (1948), Int. Rev. Code of 1939, §1607(i) ((now Int. Rev. Code of 1954, §3306(i)).

[B]ut [the] term [employee] does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship; has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules. . . .

¹⁰ Employment Taxes and Social Security Benefits—Status Quo, 62 Stat. 438 (1948).

¹¹ Int. Rev. Code of 1939, §1607(i) (now Int. Rev. Code of 1954, §3306 (i)).

¹² Willcox, "The Coverage of Unemployment Compensation Laws," 8 Vand. L. Rev. 245, 254 (1955).

¹³ *Id.* at 252, n.25. The argument rests on the assumption that Congress had originally intended that the control test be used.

¹⁴ KRS 342.004 would at least meet the argument that, by adopting the "economic reality" doctrine, the court would be invading a legislative power. The "economic reality" doctrine may still remain objectionable in substance, as an unsuitable application of KRS 342.004.

¹⁵ 139 F. 2d 60 (6th Cir. 1943).

¹⁶ 141 F. 2d 376 (6th Cir. 1944).

¹⁷ Ky. Acts 1950, ch. 187, §7, at 709.

¹⁸ *McCorkle v. McCorkle*, 265 S.W. 2d 779 (Ky. 1954); *Dick v. International Harvester Co.*, 310 S.W. 2d 514 (Ky. 1958).

one attempt to apply it in a consideration of a particular employment status.¹⁹ Rather, the court has continued to apply the orthodox vicarious liability test of control exerted over the employment relationship by the employer.²⁰ The various factors to be considered in the application of the test are stated in section 220 (2) of the *Restatement of Agency*.²¹ A recent illustration of the devotion of the Kentucky court to the use of the control test is shown in a 1959 case, *Locust Coal Company v. Bennett*,²² where the court states that the factors traditionally used for determining the employment status are those contained in *Restatement of Agency* §220 (2). The court then sets out §220 (2) in full and without further discussion decides the case.²³ This seems to preclude any thought that some other test might better serve the purposes of the Kentucky Workmen's Compensation Act. However, there are different implications in other cases.

¹⁹ *Brewer v. Millich*, 276 S.W. 2d 12 (Ky. 1955); the absence of application of KRS 342.004 is illustrated in the dissenting opinion of Judge Milliken in *New Independent Tobacco Warehouse, No. 3 v. Latham*, 282 S.W. 2d 846, 849 (Ky. 1955).

²⁰ *Diamond Block Coal Co. Sparks*, 209 Ky. 73, 272 S.W. 31 (1925), presents an early statement of the control test. A recent case applying the test is *New Independent Tobacco Warehouse, No. 3 v. Latham*, 282 S.W. 2d 846 (Ky. 1955).

²¹ *Restatement, Agency* §220 (1933).

Definition of servant:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer; and
- (i) whether or not the parties believe they are creating the relationship of master and servant.

²² 325 S.W. 2d 322 (Ky. 1959). Claimant was a coal truck driver who was permanently injured when his truck overturned. Claimant used his own truck and paid the expenses of its operation. He worked only when the truck of the coal company could not handle all of the production. He was paid seventy cents per ton hauled and his earnings varied from \$7.00 to \$100.00 per week. He was told where to haul the coal and was at times required to help load the truck. There was testimony to the effect that claimant assumed that he was covered by Workmen's Compensation. The coal company reserved the right to terminate the agreement.

²³ *Ibid.*

In *Brewer v. Millich*,²⁴ where the question was whether a particular worker was an employee within the act, the court said:

In answering this question, the approach to be used is that of determining the relation of employer-employee under the Workmen's Compensation Act rather than of master and servant or principal and agent in tort actions. The workmen's compensation approach is broader and uses a more liberal construction favoring the employee. This is in harmony with the purpose of the Act in affording protection to the employee because of his inability to withstand the burdens of injury occasioned by his employment and the resultant loss of work.²⁵

The court decided that claimant was an employee despite the presence of a contract which seemed to call for a finding of independent contractorship.²⁶ The contract was treated as a sham created for the purpose of hiding the true relationship which was that of employer-employee.²⁷ Thus the court seems to hold that the true nature of the employment relationship²⁸ should control the finding rather than the absence or presence of surface factors of control.²⁹ In *New Independent Tobacco Warehouse, No. 3 v. Latham*, decided in the same year as *Brewer v. Millich*, the court seems to follow the *Brewer* theory that the employment status is determined by looking to the true nature of the actual relationship, in holding that an architect was an independent contractor.³⁰ The court said that the control test governed and that upon application of this test it was obvious that the architect was an independent contractor.³¹ However, as pointed out in the dissent, the factors pointing toward independent contractorship

²⁴ 276 S.W. 2d 12 (Ky. 1955). Claimant had contracted to cut and further process certain trees for a stave manufacturer. The contract provided that claimant as an independent contractor was to hire his own men, make his own payroll, make and report deductions of social security, withholding tax, and Kentucky unemployment tax, and pay same to the proper authorities. It was further provided that the claimant was to use care in cutting, manufacturing and delivering the bourbon stave bolts, and should he fail to do so as instructed by the manufacturer of staves, then the manufacturer of staves had the right to cancel and take over the contract. Claimant was to be paid \$35.00 per cord for all bourbon stave bolts delivered and accepted.

²⁵ *Brewer v. Millich*, *supra* note 24, at 15.

²⁶ A finding of independent contractorship is indicated by a consideration of the form of the contract, the method provided for payment, and the fact that the contract provided that claimant was to hire his own helpers and make his own payroll.

²⁷ *Brewer v. Millich*, 276 S.W. 2d 12, 17 (Ky. 1955).

²⁸ The court points out the position of the employer as a manufacturer while the claimant was a mere worker without capital with which to engage in business. *Brewer v. Millich*, *supra* note 27 at 18.

²⁹ *Accord*, *Partin-Lambdin Lumber Co. v. Frazier*, 308 S.W. 2d 792 (Ky. 1957).

³⁰ 282 S.W. 2d 846 (Ky. 1955). The worker was in the category of a professional man, who specialized in the design and supervision of construction of tobacco warehouses.

³¹ *New Independent Tobacco Warehouse, No. 3 v. Latham*, *supra* note 30, at 848, 849.

did not seem so decisive as to demand a reversal of the Board's finding that the architect was an employee.³² Thus the negative implication of the decision is that, despite the factors of control present which would reasonably warrant deciding that the architect was an employee, the Workmen's Compensation Act is simply not intended to cover jobs of this character.³³ This decision, while probably reaching the correct result, displays the inherent conflict present in using the control test in applying legislation, the purpose of which is to attack an entirely different problem from that for which the control test was originally developed.³⁴

The confusion in reasoning and result arising from such a conflict is further illustrated by four recent cases involving an employment relationship which is often found in the Kentucky coal fields. The fact situation in *Sigmon Ikerd Co., Inc. v. Napier*³⁵ is representative of the employment relationship of the claimants in these cases. There the claimant was a coal truck driver occupied in hauling coal from a stripping operation to certain specified ramps. He owned his truck and paid all the expenses involved in its operation including the salary of a driver when he did not drive the truck personally. Claimant was paid by the defendant on a tonnage basis for the coal hauled. The defendant retained the right to terminate the arrangement at any time and to choose the place where the coal was to be loaded and unloaded. Claimant did not have regular working hours and was under no obligation to haul any certain amount of coal. He was injured while hauling coal from defendant's stripping operation to a conveyor. The Workmen's Compensation Board found that claimant was an independent contractor and dismissed his application for compensation. The circuit court reversed, holding that claimant was an employee of the defendant. The Court of Appeals reversed the circuit court and affirmed the order of the Workmen's Compensation Board. The court conceded that many details of the employment relationship were indefinite, but went ahead to find claimant to be an independent contractor, emphasizing the following factors:³⁶ (1) method of payment, (2) hiring and payment of a driver by claimant, and (3) payment of the expenses of the operation of the truck by claimant. In passing, the court cited *Johnson v. Byrne & Speed Coal Corp.*,³⁷ a

³² *Id.* at 849.

³³ The obvious economic independence of the architect seems inescapable.

³⁴ 1 Larson, *op. cit. supra* note 2, §43.42.

³⁵ 297 S.W. 2d 917 (Ky. 1956).

³⁶ *Accord*, Hacker v. Hacker, 296 S.W. 2d 713 (Ky. 1956) where the court relied on the *Napier* case; Locust Coal Co. v. Bennett, 325 S.W. 2d 322 (Ky. 1959). See comment on the Bennett case in 48 Ky. L.J. 485 (1960).

³⁷ 271 Ky. 216, 111 S.W. 2d 67 (1937).

vicarious liability case, where the Workmen's Compensation Act was not before the court.

In *Cutshin Coal Co. v. Campbell*,³⁸ the court held a coal truck driver to be an employee even though the employment relationship in question was very similar to the one before the court in the *Napier* case.³⁹ The court stated that the principles announced in *Brewer v. Millich*⁴⁰ and *Partin-Lambdin Lumber Co. v. Frazier*⁴¹ were controlling and distinguished the *Napier*⁴² case and *Hacker v. Hacker*⁴³ upon three points. In the latter two cases: "(1) the trucker was engaged in an independent business, (2) the Board found the claimant was not an employee, and (3) the element of estoppel was not present."⁴⁴ The fact that the driver had been regularly engaged by the coal mining company for seven years in performing an integral part of the business is emphasized as indicating there was in fact an employer-employee relationship.

The seriousness of the problem created by decisions such as the *Campbell* case is emphasized by a further consideration of the position occupied by the coal truck drivers in the Kentucky coal fields. Generally these trucking operations are one-man endeavors marked by the circumstance of almost complete economic dependence upon the particular mining company concerned. Sometimes the driver-owners are allowed to buy "company" trucks by reimbursing the company from payments received during their initial hauling operations. The right to terminate the hauling agreement is usually retained by the company. In almost all cases the drivers are performing an essential part of the business in hauling the coal from the mining operation to the tippie.⁴⁵ Thus it seems that there has developed a definite "class" of workers within the industry, who would ordinarily be unable to bear the financial responsibility for injuries peculiar to the industry. Coverage by the Workmen's Compensation Act would seem to follow such a conclusion. However, in three of the four cases decided by the

³⁸ 309 S.W. 2d 39 (Ky. 1957).

³⁹ The *Napier* case could have been distinguished upon an element of estoppel found in the *Campbell* case.

⁴⁰ 276 S.W. 2d 12 (Ky. 1955).

⁴¹ 308 S.W. 2d 792 (Ky. 1957).

⁴² 297 S.W. 2d 917 (Ky. 1956).

⁴³ 296 S.W. 2d 713 (Ky. 1956).

⁴⁴ *Cutshin Coal Co. v. Campbell*, 309 S.W. 2d 39, 40 (Ky. 1957). The element of estoppel could probably have controlled the decision, but it will not be further discussed as it is not important to the reasoning of the court.

⁴⁵ The Kentucky "truck" mines operate without rail facilities from the mining operation to the tippie. In the year ending December 31, 1959 there were 2,540 truck mines operating in Kentucky. During the same period 178 rail mines were operating in Kentucky. The rail mines employed 15,813 men while the truck mines employed 20,071. See 1959 Kentucky Dep't of Mines and Minerals Annual Report at 20.

court, the coal truck driver was held to be an independent contractor.

In the three decisions holding the drivers to be independent contractors the reasoning of the court is based upon a broad application of the control test with all the factors adding up to a conclusion of independent contractorship. However, in the case finding the driver to be an employee, the court seems to point out the factors of duration of employment and integral part of the business as being decisive of the question. As the employment relationship of the drivers in all four cases is basically the same, an emphasis on their participation in an integral part of the business would seem to require a conclusion that all were employees. Yet, the Kentucky court has failed to so find.⁴⁶

Thus, it seems that while the court asserts that the control test governs, its application in the cases has resulted in somewhat different implications in certain situations. On the one hand, there is the situation where the court ascertains the composite factors indicating control with resulting conclusions, which often makes prediction difficult because of differences of opinion as to the relevancy of the factors under consideration. This is exemplified by *Locust Coal Co. v. Bennett*.⁴⁷ On the other hand, there is the situation where, instead of ascertaining the factors indicating control, the court determines the true nature of the contractual relationship, as exemplified by the *Brewer* case where the court struck aside an employment contract because it was a mere subterfuge created to shift the responsibility for injuries to the employees.⁴⁸

In certain instances, the court has diverged from what it calls the control test to a reliance upon a theory more germane to the purposes of the Workmen's Compensation Act. The emphasis upon the integral nature of the work performed in the *Campbell*, *Brewer* and *Frazier* cases represents a theory based upon a social policy to spread coverage to all members of the economic class intended to be benefited by the act. Thus coverage under the act depends upon what the worker's actual status is within the particular economic endeavor and not upon a summation of the surface factors of control which are absent and those which are present. Recognition that such factors as (1) economic dependence of the worker upon the employment (employer),

⁴⁶ If the "integral part of the business" test is used, the duration of the individual employment would seem irrelevant in itself, as the trucking operations would be an integral part of the business whether the individual driver worked one day or seven years. See, comment, 48 Ky. L.J. 485 (1960).

⁴⁷ 325 S.W. 2d 322 (Ky. 1959).

⁴⁸ *Brewer v. Millich*, 276 S.W. 2d 12 (Ky. 1955); see 1 Larson, *op. cit. supra* note 2, §45.10, where there is a discussion of a trend towards disguising certain employment status' particularly in the peripheral areas of the modern business enterprise.

(2) inability of the individual to bear the financial burden of industrial injuries and (3) primary reliance by the worker upon a single source of work are the important considerations in workmen's compensation litigation over the employment status would eliminate the need for the use of the orthodox control test.

The more liberal attitude⁴⁹ found in some of the Kentucky cases is probably an indication that Kentucky is following a trend pointed out by Larson when he says:

[W]ith the vast amount of leeway within the common-law definition (control test) itself, what is happening with increasing frequency is that the weight accorded the different factors of the definition is subtly influenced by the court's conception of the evil to be corrected and, accordingly, of the class of persons who actually need the protection afforded by the legislation. As a result, although many courts if required to do so by a technical interpretation of the employee concept will still exclude from the act classes of workers while admitting that they need compensation protection as much as anyone, the overall development of compensation law shows that the concept has been broadened and altered (and in rare instances even narrowed) to fit the peculiar needs and purposes of compensation law.⁵⁰

Thus the difficulty of ascertaining the test that the Kentucky court in fact uses to decide the employee-independent contractor question is a significant obstacle facing counsel for either claimant or employer. In the interests of consistency in theory and of predictability, the court should adopt a test which is more germane to the purposes of the Workmen's Compensation Act. While the purpose of the common-law control test as applied to master-servant relationships is to delimit the scope of a master's vicarious tort liability, in contrast the Workmen's Compensation Act is concerned more particularly with the injuries which occur to the employee through acts of co-employees or third parties.⁵¹ Such injuries are an industrial fact of life recognized as a by-product of mechanical production methods. Where these injuries are involved, the applicability of the vicarious liability control test seems irrelevant.⁵²

A test which would be more conducive to the accomplishment of the ultimate purpose of the Workmen's Compensation Act is the "relative nature of the work test".⁵³ The test has a double emphasis: (1) the nature of the claimant's work and (2) the relation of that

⁴⁹ See *Brewer v. Millich*, *supra* note 48; *Cutshin Coal Co. v. Campbell*, 309 S.W. 2d 39 (Ky. 1957); *Partin-Lambdin Lumber Co. v. Frazier*, 308 S.W. 2d 792 (Ky. 1957).

⁵⁰ 1 Larson, *op. cit. supra* note 2, §43.41, at 629.

⁵¹ *Id.*, at §43.42.

⁵² *Ibid.*

⁵³ 1 Larson, *op. cit. supra* note 2, §43.50.

work to the employer's work.⁵⁴ Larson enumerates the significant ingredients as being:

[T]he character of the claimant's work or business—how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on—and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.⁵⁵

Larson would find a presumptive area of intended protection where the services of any worker form a regular and continuing part of the cost of the product and where the worker's method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial injury can be channeled.⁵⁶ Under such a formula the Kentucky coal truck drivers would seem presumptively to be employees. Furthermore, the court would have encountered no difficulty in categorizing the architect in the *Latham* case as an independent contractor.

The "relative nature of the work" test may prove inadequate in certain instances. However, such a test would be more suitable for determining the employment status than the control test which was developed for an entirely different purpose. The adoption of the "relative nature of the work" test would improve the predictability of employment relationships in those situations where the factors of control seem to warrant a finding of employer—employee status, but where the worker involved is not within the economic class intended to be protected by the social purpose of the Workmen's Compensation Act. On the other hand, in those situations where the worker involved is within the economic class intended to be protected by the social purpose of the Workmen's Compensation Act, but where the factors of control, as applied in the orthodox manner, do not call for a finding of the employer—employee status, an application of the "relative nature of the work" test would avoid the necessity of resorting to a fiction or placing an undue emphasis upon an isolated factor of the control test.

In the interests of predictability for both employer and claimant and in order that the Workmen's Compensation Act may better serve the purpose for which it was enacted, the "relative nature of the work" test should be adopted by the court in the consideration of the applicability of the act to individual employment relationships.

Richard W. Spears

⁵⁴ *Id.* at §43.52.

⁵⁵ *Ibid.*

⁵⁶ 1 Larson, *op. cit. supra* note 2, §43.51.