

**Independent Contractor, Workmen's Compensation Act.
Industrial Accident Board.**

A contractor, agreeing to do all the work for constructing a certain roadway according to specifications, furnishing all tools and equipment, for a certain amount per yard in accordance with estimate of engineer, the work to be accepted by engineer on completion, is an Independent Contractor.

January 4, 1917.

Industrial Accident Board,
Helena, Montana.

Gentlemen:

You have submitted to this office a letter dated December 16th, 1916, from Hilger Loan & Realty Company together with memorandum of agreement in which B. P. Melchert and C. E. Weir are mentioned as the parties of the first part and in which the names of the parties of the second part are left blank.

By the terms of this agreement the parties of the second part are to do and perform certain work, labor and services in excavating and preparing a certain roadway along certain lines designated by the engineer for the Three Forks Portland Cement Company, and the parties of the second part are to complete the work according to the specifications, classification and yardage designated by the engineer. It is further provided in this agreement that the parties of the second part are to furnish all necessary tools and equipment for doing and performing the work within a reasonable time and in a good and workmanlike manner, and that all expenses, including board and other incidental expenses, be paid for and borne by the parties of the second part, and when the work is fully done, completed and accepted by the engineer, the parties of the first part promise and agree to pay to the parties of the second part a certain amount per yard in accordance with estimates and yardage designated by the engineer.

It would appear that the parties of the first part mentioned in this agreement are independent contractors within the meaning of the Workmen's Compensation Law. Section 6 (kk) provides: "An independent contractor' is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished."

The court in *Thompson v. Twiss*, (Conn.) 97 Atl. at 330 says:

"When the doing of a specific piece of work is entrusted to one who exercises an independent employment and selects his own help and has the immediate control of them, and the right to control the method of conducting the work, the contractor is an independent contractor. *Alexander v. Shermans Sons*, 86 Conn. 293, 297, 85, Atl. 514; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 525, 28 Atl. 32.

"The decisive test is: Who has the right to direct what shall be done and when and how it shall be done? Who has

the right to the general control? There are characteristics of a general contractor which are suggestive, but not controlling. He is ordinarily one who carries on an independent employment. His contract relates to a given piece of work and for a given price. He is responsible for the results of his work."

The Supreme Court of Wisconsin in the case of the Town of Polk v. Railroad Commission, 143 N. W. at 190 says:

"The definitions of the term "Independent Contractor" found in the decisions are uniformly in harmony and may be summarized as 'one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to result of his work'. Powell v. Virginia Const. Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925; Humpton v. Uterkicher, 97 Iowa, 509, 66 N. W. 776; 1 Thomp. Neg. Sec. 622; Cooley, Torts (3rd Ed.) P. 1098. In Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58, our own court defined an independent contractor as 'one who—undertakes to do specific jobs of work, without submitting himself to control as to the petty details, is an independent contractor.' The most significant indicum of an independent contractor, however, is his right to control the details of the work. 1 Thom. Neg."

And to the same effect see the cases of City of Richmond v. Set-
tenderding. (Va.) 99 Am. St. R. 879 and Anderson v. Foley Bros., 110
Minn. 151. See also extensive note in 65 L. R. A. 445.

And our own Supreme Court in the case of Jensen v. Barbour, 15
Mont. 582, states as follows on pages 589-90:

"To draw the distinction between independent contractors and servants is often difficult; and the rules which courts have undertaken to lay down on this subject are not always simple of application. A rule as often quoted as any is stated in the syllabus of the case of Bibbs v. N. & W. R. R. Co., 87 Va. 711, after an able review of the authorities, as follows: 'Independent contractor is one who renders service in the course of an occupation, and represents the will of his employer only as to the result of his work, and not as to the means whereby it is accomplished, and is usually paid by the job.'"

And on pages 592-93 as follows:

"Referring again to the rules as laid down in Bibbs. v. N. & W. R. R. Co., supra, the respondent argues that Vaughn represented the will of his employer only as to the result of his work, and not as to the manner of its performance; that is to say, that Vaughn contracted to deliver to his employer the result of putting the car over the track once a day by his own methods. But so it might be argued that one's coachman contracts to produce the result of conveying his master from his house to his office, or wherever he may wish to go, or one's cook contracts to produce the result of placing before his master his daily food. But such is not the sense in which the word 'result' is used in the rule. We think that the word 'result' as so used, means a production or product of some

sort, and not a service. One may contract to produce a house, a ship, or a locomotive; and such a house, or ship, or locomotive produced is the 'result'. Such 'results' produced are often, and probably generally, by independent contractor. But we do not think that plowing a field, mowing a lawn, driving a carriage, or horsecar, for one trip or for many trips a day, is a 'result' in the sense that the word is used in this rule. Such acts do not result in a product. They are simply a service."

This case is cited with approval in *Poor et al v. Madison River Power Co.*, 38 Mont. at 361, and in *State v. Hughes*, 38 Mont. at 473.

In *Allen v. Bear Creek Coal Co.*, 43 Mont. at 285, the Court held that if an employe has contracted to do a piece of work furnishing his own means and executing it according to his own ideas, in pursuance of a plan previously given him by his employer, without being subject to the order of the latter as to detail, he is an independent contractor.

In view of the foregoing it would appear that the parties of the second part in the blank memorandum of agreement submitted by you would be independent contractors within the contemplation of Section 6 (kk) of Chapter 96, Session Laws 1915.

The letter and copy of agreement are herewith returned for your files.

Respectfully,

S. C. FORD,

Attorney General.