

**Workmen's Compensation Act—Accidental Drowning—
Independent Contractor, Who Is.**

Where one is to receive a lump sum for the performance of some employment, he is not necessarily thereby rendered an independent contractor.

August 30, 1919.

Industrial Accident Board,
Helena, Montana.

Gentlemen:

You have submitted to me the files and correspondence in connection with the accidental drowning of Nicholas B. McKelvie in Yellowstone County, from which I gather the following facts: That an obstruction of brush and logs had formed under the pier of the Duck Creek bridge in Yellowstone County, and that the road supervisor of the district, Hectar Ross, was ordered by the Board of County Commissioners to remove the same; that he saw Mr. McKelvie and engaged him to remove the same; that he was to be paid therefor the sum of \$5.00. There was no time fixed with which the work was to be done, nor so far as the correspondence shows, was there any further direction in regard to the matter. It appears he made one attempt to remove the obstruction but the water being too high, he waited until July 26th, 1919, when he again attempted to remove the obstruction, and in doing so was drowned. The claim for compensation under the Workmen's Compensation Act was in due time presented to the board.

The question is: Does the deceased, by reason of the manner of his employment or the nature of the work to be performed, come within the provisions of the Act? That the nature of the work is clearly within the provisions of the Act and the amendments thereto will be admitted.

The general rule as to what constitutes an independent contractor is well stated in a former opinion of this office referred to in your letter. See 7 Opinions of Attorney eGneral, pages 6 and 7. It is said there:

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

It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent.

It is easy to give general directions but not always easy to apply them to the facts of the particular case. All the circumstances should be taken into consideration. In this case did the county or the road supervisor have the right to control, even though he was not present and actually doing so? The employer may leave to the employee the mode and details of doing the work. *Markovich vs. N. P. Ry. Co.* 174 Pac. 183. In this regard it would appear that the nature and extent of the work to be performed would not require active and present supervision more than in any case of ordinary employment where men were set to work to do a certain thing. The doing of any ordinary work as plowing a road or shoveling dirt might reasonably be left to the one doing it without active present supervision, for a certain length of time. In the present case the deceased was not doing an act of constructive employment. The removing of the brush and driftwood from the pier was all that was necessary, what was done with it was of no consequence. Was it possible in this case to give all the directions necessary at the time the agreement was made by the road supervisor and were any, in fact, given? Was the work estimated by the supervisor at a certain amount, who left the doing of it until such time as it could reasonably be done with safety? In determining this matter, some reference might properly be made to the duties of a road supervisor, which will be found in Sections 6, 7 and 8 of Chapter 141, 1915 Session Laws. Section 6 reads as follows:

“Whenever it becomes necessary for any road supervisor, in the construction or repairing of any public highway in his district, to secure the assistance of other persons, teams and implements, and to contract as to the price to be paid therefor, which must not exceed the rate of four dollars (\$4.00) per day of eight hours for each person and six dollars (\$6.00) per day of eight hours for man and team; but the time taken by such person or teams in going to and from the place of labor shall not be included within such period of eight hours.”

Section 7 reads as follows:

“Whenever any public highway becomes obstructed from any cause, or any bridge need repairing or becomes dangerous for the passage of teams or travelers, the Board of County Commissioners, or the supervisor of the road district, if there be one, upon being notified thereof, must forthwith cause such obstruction to be removed, or bridge repaired, for which purpose such person as the Board of County Commissioners may designate or the road supervisor of the district may order out such number of inhabitants of the district as may be necessary to aid in removing such obstruction or repairing such bridge; or if any person after having three days' notice, whether said notice be oral or written, who being physically able to respond, shall fail to be present at the time and place designated, or who, having attended, refuses to obey the

direction of the person in charge of the work, or passes his time in idleness, or inattention to the duty assigned him, shall be liable to punishment as for a misdemeanor”

It will be seen that the supervisor's power to contract is limited to the per diem to be paid. The removal of the obstruction was one of the obvious duties of the road supervisor, but by direction of the board and by direction of law, and had he personally performed the act, and in doing so lost his life, there is little doubt that his lawful representative would be entitled to the benefits of the Act.

While the fixing of a lump sum is an element in determining whether one is an independent contractor or an employee, it is not conclusive in the test as to the relationship. One may be an independent contractor, though not to be paid a lump sum for his work, as where paid by the day. On the other hand, a person is not an independent contractor merely because paid by the piece or job. 26 Cyc. 1551 (E). Neither is an employee an independent contractor merely because he furnishes the appliances and materials. Adams Express Company vs. Schoefield, 64 S. W. 903.

The foregoing rules of law are stated in order to assist you in determining whether, under the facts, the deceased was an independent contractor, for, in this case, the right to control and direct what is done is more of a question of fact than law and is for your office to decide under the circumstances. It would appear that the facts here presented are not inconsistent with the relation of employer and employee. However, this is for your office to determine.

Respectfully,

S. C. FORD,

Attorney General.