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Sections 115-131, c. 30, R. S. 1954 (Elevator Law)

FACTS:

The elevator law, section 120, c. 30, R. S. 1954, as amended, provides for the examination and licensing of elevator inspectors in part, as follows:

> "In addition to any state elevator inspector appointed under the provisions of section 118, the Commissioner shall, upon the request of any company licensed to insure against loss from elevator accident in this state, issue to any elevator inspector of such company a certificate of authority as an authorized elevator inspector, provided that each such inspector before receiving his certificate of authority shall pass satisfactorily the examination provided for in section 121 or in lieu of such examination shall hold a certificate as an inspector of elevators in a state that has a standard of examination equal to that in this state. The commissioner shall also upon request from any elevator company doing business in this state issue to any employee designated by the requesting company a certificate of authority as an authorized elevator inspector provided that each such inspector before receiving his certificate of authority shall pass satisfactorily the examination provided for in section 121. An authorized inspector appointed under the provisions of this section shall receive no salary from the state and have no expenses paid by the state and continuance of such authorized inspector's certificate of authority shall be conditioned upon continuing in employment as an elevator inspector by such insurance company, or

> in employment by such elevator company, as the case may be, and upon his maintenance of the standards imposed by the provisions of sections 115-131, inclusive. Such authorized inspectors shall inspect all elevators insured or maintained by their respective companies, and the owners or users of such elevators shall be exempt from the payment of fees for the periodic inspections provided in section 125. Each company employing such an authorized inspector shall within 15 days following each legally required inspection made by an authorized inspector file a report of such inspection with the supervising inspector."

You indicate that certain problems have arisen regarding this particular section as to a proper interpretation.

QUESTION:

Would a person otherwise qualified who works on a contractual basis, doing inspections on a fee basis, be considered an employee and eligible to make inspections for an insurance company?

ANSWER:

Yes.

OPINION:

C. 30, § 116, R. L. 1954, provides:

> "'Authorized elevator inspector' shall mean an individual authorized by the commissioner to examine and inspect elevators and may be a person in the employ of an elevator company doing business in this state or a person in the employ of an insurance company licensed to insure against loss from elevator accidents in the state.
>
> . . . .

"The word 'employment' is a common one, generally used in relation to the most common pursuits, and therefore ought to be received as understood in common parlance. Although it has been said that the term implies a contract on the part of the employer to hire, and on the part of the employee to perform services, and that until such a contract is mutually entered into it can have no binding obligation on either party, nevertheless it does not necessarily import an engagement or rendering of service for another, but may refer either to such service, or to a vocation business, or profession followed or practiced independently. The word is not of the technical language of the law, or of any science or pursuit, and must be construed according to the context and the approved usage of the language. It has been variously defined as the act of attending to the duties and services of another, the act of being employed for one's self; in attending to one's own affairs; the act of hiring; the act of employing or using; agency or service for another or for the public; an agency for a temporary purpose, which ceases when that purpose is accomplished; the state of being employed; appointment; avocation; business; calling; commission; engagement; occupation; office; profession; service; trade; use; vocation; work; also the object of industry; that which engages the head or hands." Slocum Straw Works v. Industrial Commission, 286 N. W. 597, 232 Wis. 71. 14 A Words and Phrases, "Employment" 101.

> "Distinction between 'independent contractors' and 'employees' is one of control by one for whom work is being done, and in absence thereof, there can be no finding of employment. People ex rel Fainburg v. Chapman, 87 N.Y.S. 2d 41, 46, 274 App. Div. 715." 14 Words and Phrases "Employee" 703.

Eight tests are used to determine whether relationship is independent contractor or master and servant, no one is conclusive. (1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, (2) Independent nature of his business or his distinct calling, (3) His employment of assistants with the right to supervise their activities, (4) His obligations to furnish necessary tools, supplies and material, (5) His right to control the progress of the work except as to final results, (6) The time for which the workman is employed, (7) The method of payment, whether by time or by the job, and (8) Whether the work is part of the regular business of the employer. Kirk v. Lime Co., 137 Me. 79.

It is apparent that the word "employee" has been given a liberal construction, primarily in the field of workmen's compensation law, an area in which there must be a finding of employment in order for compensation to be awarded.

If a person is engaged in rendering services to another and he is not on the payroll of the person to whom the services are rendered, it does not necessarily follow that the worker is not an employee of that person. As indicated above, if the person to whom services are rendered has the right to supervise the manner and progress of the work being performed and the wokk is a part of the regular business of the employer, then the fact that there is a contract for the performance of work at a fixed fee, that the worker will furnish the necessary tools, supplies and materials, and the work is of an independent nature or is a distinct calling does not necessarily mean that the worker is an independent contractor and not an employee.

Aside from the employment of state elevator inspectors, it would appear, as a practical matter, that the only persons having need of authorized elevator inspectors would be elevator companies and insurance companies. The Legislature did not intend to establish the condition that, before a person can be licensed as an authorized elevator inspector, he must be exclusively employed as a full-time employee of an elevator company or an insurance company. If a person is licensed as an elevator inspector and does occasional inspections for an insurance company, a liberal construction of the statute would necessarily find the inspector to be an employee of the insurance company when the inspections were being performed.

Therefore, a person, otherwise qualified, who works on a contractual basis, doing inspections on a fee basis, can be considered an employee and eligible to make inspections for an insurance company.

QUESTION:

Would a person employed by an elevator company, holding a certificate of authorization to inspect elevators maintained by the elevator company, be allowed to inspect elevators, not maintained by his company, for an insurance company on a fee basis?

ANSWER:

Qualifiedly, yes.

OPINION:

If a person is licensed as an authorized elevator inspector and is regularly employed by an elevator company, there would be no reason why he could not inspect elevators for an insurance company, said elevators not being among those maintained by the elevator company, and perform such inspections on a fee basis. The qualification is that any incompetence or untrustworthiness resulting from such inspection should not be construed to be that of the elevator company which regularly employed the inspector. Rather, any recourse against the employer by the Department of Labor and Industry should be directed to the insurance company since the insurance company was the employer of the inspector and responsible for his incompetence at the time of the inspection in question. For purposes of inspecting elevators for an insurance company on a fee basis by an authorized elevator inspector regularly employed by an elevator company, said elevators not being among those maintained by the elevator company, the inspector must be considered the employee of the insurance company and not the employee of the elevator company.

This opinion should not be construed as overruling the opinion of James Glynn Frost of October 29, 1956, but merely an expansion of said opinion.

Respectfully submitted,

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COB/elf