Opinion No. 52-5494

February 14, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Ebenezer Jones Assistant State Labor Commissioner Santa Fe, New Mexico

*{*208}* Recently you requested from this office on interpretation of that portion of Section 57-109 N.M.S.A. which reads as follows:

"He (The Labor Commissioner) shall have the power and authority, when in his judgment he deems it necessary, to take assignment of wage claims and prosecute actions for collections of wages or other claims or demands of employees or ex-employees, . . ."

Concerning this section, you posed this question:

"If an owner of a saw mill agrees to pay a workman so much compensation per thousand feet, to cut and haul timber to the mill, would the workman hired under the above conditions be an employee of the owner of the mill within the meaning of the above mentioned section?"

*{*209}* I have since learned from your office these additional facts concerning the workman you mention. I understand that the workman furnishes and uses his own equipment for this cutting and hauling operation, and uses his own methods in accomplishing the task. I further understand that he is not under the control and supervision of the owner of the mill in the performance of his duties, either as to how the work should be done or as to the actual working hours.

Taking all these factors into consideration, it is my opinion that the man you mention is an "independent contractor" and not an "employee" within the meaning of Section 57-109.

In determining whether a man is an employee or an independent contractor, the courts have generally used three main tests:

1. Which party has supervision and control over the operation?

2. Which party furnishes the tools for the operation?

3. Whose means and methods are employed to accomplish the job? (Which is related somewhat to (1) above).

It is the general rule that one who is not under the supervision of the man who hires him to do the work is an independent contractor rather than an employee or servant. See **21**

Words and Phrases 78, et. seq., and **14 Words and Phrases 392.** It is likewise the rule that the fact a workman uses his own tools and equipment on a job is an element tending to make him an independent contractor. **21 Words and Phrases 90-93.** In some cases ownership of tools has been held to be the controlling factor. Furthermore, it is likewise the general rule that one who uses independent judgment as to how a job shall be accomplished is not an employee, but an independent contractor. **21 Words and Phrases 93,** et. seq.

As has perhaps been suggested above, none of these three tests is absolute. Each finding merely aids the court in determining the actual relationship between the parties. In some cases there is evidence tending to show that a man is an employee, but stronger evidence showing that he is an independent contractor. For instance, in **Moore v. Phillips, 120 SW 2d 722,** an Arkansas case, it was provided in the contract that the logger was to use his own equipment and cut and deliver timber for the lumber company at the rate of so much per thousand feet. The contract further provided that the timber was to be cut in a careful manner "as directed" by the company. The Court held, however, that the logger was an independent contractor rather than a servant or employee. For a similar holding in a case involving logging operations, see **Hollingsworth v. Robe Lumber Company, 45 P. 2d 614.**

It could perhaps be argued here that the word "employee" as used in § 57-109 was never intended by the Legislature to have such a narrow and technical meaning, and that the distinction here between "employee" and "independent contractor" is an unwarranted one. However, it must be pointed out again that employee is the word actually used, that this word has a well-defined meaning in legal and legislative terminology, and further, that the New Mexico Legislature has given no indication that it intended the word to carry a broader meaning. A review of the various labor acts indicates that some State Legislatures define with great particularity the meaning to be given words used in their labor statutes. But again, such is not the case in Chapter 57, Article 1, N.M.S.A., and therefore the task of statutory interpretation in this case is limited to construing the words actually used, without qualifying definitions, therein.

To summarize, all the facts I have before me concerning the workman you mention indicate most strongly that he is an independent contractor and not an employee *{*210}* within the meaning of Sec. 57-109 N.M.S.A.

I hope that this opinion answers satisfactorily your questions on this subject.