

December 2019

## The Wyoming Real Estate Broker v. Employment Security Commission

R. Bradford Laughlin

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlj>

---

### Recommended Citation

R. B. Laughlin, *The Wyoming Real Estate Broker v. Employment Security Commission*, 19 Wyo. L.J. 70 (1964)

Available at: <https://scholarship.law.uwyo.edu/wlj/vol19/iss1/9>

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

**THE WYOMING REAL ESTATE BROKER v.  
EMPLOYMENT SECURITY COMMISSION**

The question of whether real estate brokers come within the purview of the Unemployment Compensation laws of the various states with regard to commissions earned by their salesmen is not yet settled in a unanimous fashion. The question has not been litigated in Wyoming. How the Wyoming Court will hold when confronted with the problem is, of course, mere conjecture. Presently, the Employment Security Commission of Wyoming requires the broker to contribute.<sup>1</sup> Holdings in the other jurisdictions indicating current trends in this area and the rationale behind the decisions are interesting.

There is a divergence of case authority as to whether a real estate broker, "employing" salesmen on a typical commission arrangement,<sup>2</sup> is subject to unemployment compensation contributions in regard to the commissions earned by his salesmen. The problem arises by virtue of the rather loose and informal relationship between the broker and his salesmen. Whether this relationship can be considered as one of "employment", as called for by the Unemployment Compensation laws, is the substance of the controversy. If the relationship is not one of employment, these laws do not apply<sup>3</sup>.

In making this determination, the Wyoming Employment Security Commission applies what is known as the statutory A-B-C test<sup>4</sup>:

"Services to be performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that —

(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(b) Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession or business."

The Commission regards it "doubtful if any real estate salesman could meet the so called A-B-C test";<sup>5</sup> hence, the relationship between the broker and the salesman is one of employment.

- 
1. Employment Security Commission, Interpretive Decision, Legal No. 78, 1951.
  2. The commission is usually determined as a certain percentage of the fee earned. Quite often there is no written contract, and the salesmen are free to engage in other full time work. The broker may offer advice, but does not insist it be followed. Salesmen are not provided access to a drawing account, expense money or car, and usually have no specified hours of work, though they are expected to keep a certain amount of contact with the broker.
  3. A. J. Meyer and Co. v Unemployment Compensation Commission, 348 Mo. 147, 152 S.W.2d 184 (1941).
  4. Wyo. Stat. §27-23 I (V) (1957).
  5. Employment Security Commission interpretive decision, supra note 1.

When considering this A-B-C test it has been said that these three factors are not given for the purpose of initially determining whether a certain labor performed, or service rendered, comes within the term "employment" as used in the Act. The test is applied after one determines whether such work should be considered as "employment" within the Act. The A-B-C exclusionary test is then applied only to those types of work which, up to that point and in all other respects, are "employment" as contemplated by the Act<sup>6</sup>. Thus it is that the real bone of contention revolves around whether the relationship is one of employment or not, and the A-B-C test is rarely considered and many times not contested<sup>7</sup>.

In determining this question a court may apply the traditional common law interpretation of "employment", or may give it a new definition for purposes of this Act.

Under the common law, one is in the employ of another when the service performed as to method and manner of performance, as well as result, are subject to the employers' control<sup>8</sup>. This does not mean that there must be no control whatever for one to be considered an independent contractor. "The courts have never held that, in the determination of the relationship of independent contractor there must be an absolute and complete freedom from control."<sup>9</sup> It appears that where the common law definition of "employment" is applied, a real estate salesman in relation to his broker is not an employee; hence, he is excluded from operation of the Act<sup>10</sup>.

The question now arises as to the rationale for using a definition of "employment" other than the common law definition. A major argument advanced by those advocating a liberal version is that the licensing statutes specifically refer to a real estate salesman as "any person who for a compensation or valuable consideration is employed either directly or indirectly by a real estate broker . . ."<sup>11</sup> It is then contended that by referring to salesmen as "employees" in the statutory phraseology above quoted, the legislature rejects the common law definition and relationship of independent contractor between broker and salesman, and specifically sets up an employee relationship<sup>12</sup>. As to this proposition, however, advocates of the opposing view feel that the licensing statute is "promulgation for public protection" connoting no more than a requirement of a certain degree of reliability in the profession. The licensing acts should be operative in a narrow field only, and the legislation should not be interpreted so

---

6. *A. J. Meyer and Co. v. Unemployment Commission*, supra note 3.

7. *McClain v. Church*, 72 Ariz. 354, 236 P.2d 44, 46 (1951).

8. *King v. Southwestern Greyhound Lines, Inc.*, 169 F.2d 497, 498 (10th cir. 1948).

9. *Washington Recorder Publishing Company v. Ernst*, 199 Wash. 176, 91 P.2d 718, 726 (1939).

10. *In re Wilson Sullivan Co. Inc.*, 289 N.Y. 110, 44 N.E.2d 387 (1942).

11. Wyo. Stat. §33-344 (1957).

12. Employment Security Commission interpretive decision, supra note 1; *In re Wilson Sullivan Co. Inc.*, supra note 10.

as to give a meaning beyond its realm and scope<sup>13</sup>. There appears no reason whatsoever for reading terms of the real estate licensing laws into an employment security law. The statutes are not designed to effectuate a common result<sup>14</sup>.

Courts holding for the Commission sometimes base their holding on public interest and welfare, and promotion of the legislative intent. New Mexico has definite ideas as to this:

"The holdings of the courts that such salesmen are independent contractors are the result of some of the courts holding on to the common law concepts of the law of master and servant, instead of realizing the acts call for a liberal construction to the end their remedial and humanitarian purposes may be given effect and recognizing that statutory definitions modify the common law definitions of master and servant. Instead, by judicial fiat, they made the common law swallow the statutory modifications common to all of these acts and thus nullified the legislative will."<sup>15</sup>

Another area of contest is whether the salesmen are working for wages so as to be included with in the statutory definition of employment. Here again courts go in all directions. The advocates for the brokers insist the commissions paid are not such wages as are referred to in the statute. Some courts adopt this view basing their rationale on the contention that the Act "did not seek to protect those who performed services for another for which he was under no obligation to pay, or those who, while ostensibly or incidentally serving another, were in reality engaged in their own independent business."<sup>16</sup> It cannot be successfully maintained that the salesmen performed services for the broker for wages or under a contract of hire. Commissions are not paid by the broker, but by the parties to the sale<sup>17</sup>. The term "in employment" as used in the statute<sup>18</sup> relates to an obligation to pay for services for which there was an obligation to perform. To extend its implications would make a person who performs casual services for another, his employee<sup>19</sup>. Contrary rationale is found in the following Arizona case where it was stated:

- 
13. California Employment Stabilization Commission v. Morris, 28 Cal. 2d 812, 172 P.2d 497, 500 (1946).
  14. Demute, Inc. v. Michigan Employment Security Commission, 339 Mich. 713, 64 N.W.2d 545, 549 (1954).
  15. Graham v. Miera, 59 N.M. 379, 285 P.2d 493, 496 (1955).
  16. Realty Mortgage and Sales Co. v. Oklahoma Employment Security Commission, 197 Okl. 308, 169 P.2d 761, 764 (1945).
  17. Guaranty Mortgage Company of Nashville v. Bryant, 179 Tenn. 579, 168 S.W.2d 182, 184 (1943).
  18. The 1936 Oklahoma statute here under consideration defined wages as "all compensation payable for personal services, including commissions and bonuses..."
  19. Realty Mortgage and Sales Co. v. Oklahoma Employment Security Commission, supra note 16.

"The salesmen were bound to look to the defendant for their proportionate part of the commissions. The defendant was under obligation to pay the commissions to the salesmen. These commissions were necessarily paid for services rendered. The salesmen therefor were, as provided in the Act, performing services for 'wages' which term includes commissions, for the defendant."<sup>20</sup>

As stated in the introduction, there are no Wyoming decisions on the question though presently the Employment Security Commission requires the broker to contribute in regard to his salesmen. The several cases that are concerned with the construction to be given the employment relationship are inconclusive as to the problem at hand. Under *Tharp v. Unemployment Compensation Commission*<sup>21</sup> a barber was subject to contributions under the Wyoming Act as an employer where he held the barber shop license, leased shop premises to other barbers, and furnished miscellaneous items such as towels and powders; the other barbers supplied their own tools, however, and paid one-third of their proceeds to the lessor. In addition to finding the requisite control in the relationship to have an employer situation, the Court felt that since the Barber's Act required that the shop must be always under the supervision and management of a registered barber, a finding of other than a master and servant relationship would have been in violation of the penal provisions regulating barber shop operations. The Court cites *Lowmiller v. Monroe*<sup>22</sup>, a 1929 California case, as a basis for this theory. California since, has not only ignored *Lowmiller v. Monroe*, but has expressly overruled it<sup>23</sup>.

Notwithstanding the *Tharp* case above referred to, it appears from other Wyoming decisions as well as from a majority of other jurisdictions that the Wyoming Court will find the broker not subject to the Employment Security law in regard to commissions of his salesmen. This would be in line with the majority of later cases<sup>24</sup>.

It has been said that Wyoming has adopted the common law definition and has denied coverage under the Employment Security law where the performer of the service comes within the accepted definition of an independent contractor<sup>25</sup>. Indirectly Wyoming has intimated acceptance of the common law definition<sup>26</sup>. Nebraska has expressly adopted the common law view<sup>27</sup>, and

---

20. *McClain v. Church*, supra note 7; see also *Babb v. Huiet*, 67 Ga. App. 861, 21 S.E.2d 663 (1942).

21. 57 Wyo. 486, 121 P.2d 172 (1942).

22. 101 Cal. App. 147, 281 Pac. 433, 282 Pac. 537 (1929).

23. *California Employment Stabilization Commission v. Morris*, supra note 13, at 501.

24. 29 A.L.R.2d 772.

25. *Meredith Publishing Co. v. Iowa Employment Commission*, 232 Ia. 666, 6 N.W. 6, 14 (1942).

26. *Unemployment Compensation Commission of Wyoming v. Mathews*, 56 Wyo. 479, 111 P.2d 111 (1941).

27. *Hill Hotel Co. v. Kinney*, Commissioner of Labor, (Neb.), 295 N.W. 397, 398 (1940). "While there is a diversity of views among the courts on the subject and the opinions are not always unanimous, the weight of authority is that legislatures in enacting unemployment compensation statutes did not intend to depart from the common law definition of independent contractor."

such expression was quoted with favor by the Wyoming Court<sup>28</sup>. Further, the Wyoming Court has stated that if it is possible to allow a statute and common law rule to stand together, there is no reason to abolish the common law rule. The statute should be construed "in connection and in harmony with the existing law . . ."<sup>29</sup>

The primary question in determining whether or not one is an employee is one of control; in whom does control rest<sup>30</sup>? It has been said that an independent contractor is one contracting in exercise of independent employment, to do a piece of work according to his own methods, without being subject to his employer's control, except as to result of work<sup>31</sup>. Close scrutiny of the relationship of the salesman to his broker quickly reveals the looseness of the relationship and almost a complete lack of control. The salesmen in many instances hold other full time jobs along with their selling. They come and go as they please with regard to the broker's office, and are not always even expected to "report in" periodically. It must be conceded that either may terminate the relationship at will, and a certain amount of contact between the two is existent, but the courts do not require an absolute freedom from control in determination of the relationship of independent contractor<sup>32</sup>.

The Employment Security Law is a taxing statute<sup>33</sup> and such laws are to be construed in favor of the taxpayer in case of doubt<sup>34</sup>; the common law so construes the Act in favor of the broker; the majority of decisions construe the Act in favor of the broker. Notwithstanding, the Employment Security Commission of Wyoming construes the Act against the broker. The Wyoming courts have not yet spoken.

R. BRADFORD LAUGHLIN

December, 1963

- 
28. Unemployment Compensation Commission of Wyoming v. Mathews, *supra* note 26, at 503.
  29. Civic Ass'n of Wyoming v. Railway Motor Fuels, Inc., 57 Wyo. 213, 238, 116 P.2d 236 (1941).
  30. Fox Park Timber Co. v. Baker, 53 Wyo. 467, 84 P.2d 736 (1938) 53 P.2d 736, Wyo. 467 84 (1938).
  31. Lichty v. Model Homes, 66 Wyo. 347 211 P.2d 958 (1949).
  32. Washington Recorder Publishing Co. v. Ernst, *supra* note 9, at 726.
  33. A. J. Meyer and Co. v. Unemployment Compensation Commission, *supra* note 3, at 191.
  34. Equitable Life Assurance Society of U.S. v. Thulemeyer, 49 Wyo. 63 52 P.2d 1223 (1935).