

CONTROL TEST DEFINES
INDEPENDENT CONTRACTOR OR EMPLOYEE SPORTS OFFICIAL

James C. Kozlowski, J.D., Ph.D.
© 1992 James C. Kozlowski

As illustrated by the *Lynch* decision described herein, the control test determines whether a particular individual is an employee or independent contractor for workmen's compensation. Similarly, the control test is applied to determine agency tort liability for personal injury and/or property damage caused by employee negligence. In addition, the Internal Revenue Service applies this same control test to determine whether a particular individual providing services to an agency is an employee or independent contractor for federal employment tax purposes (i.e., federal withholding taxes for wages, FICA or social security taxes, and federal unemployment insurance payments.)

In each instance (workmen's compensation, tort liability, and tax liability), an agency will be responsible for agents who are employees, but not services provided by independent contractors. As indicated by *Lynch*, the degree of control exercised by an agency over the operational details of an individual's work product is determinative of employee or independent contractor status. There is no clear line of demarcation between employee and independent contractor status. As a result, each application of the control test will turn on the specific facts of each individual case. Despite such uncertainty, a review of the factors described herein should provide agencies with some guidance in determining whether a particular individual is likely to be an employee or independent contractor on the control test continuum.

Agony of Defeat for Uncontrolled Zebra

In the case of *Lynch v. Workmen's Compensation Appeal Board (Connellsville Area School District)*, 123 Pa.Comm.w. 299; 554 A.2d 159 (1989), the sole issue on appeal was "whether the Workmen's Compensation Appeal Board (Board) erred in deciding that George Lynch (Lynch) was an independent contractor rather than an employee of the Connellsville Area School District (District) for the purpose of workmen's compensation under The Pennsylvania Workmen's Compensation Act." Lynch had had his workmen's compensation claim denied on the basis that he was not an employee of the District, but rather an independent contractor at the time of the alleged injury. The facts of the case were as follows:

Lynch was 53 years of age at the time of his alleged injury during a high school football game which gave rise to his claim for workmen's compensation benefits. Lynch, a full-time practicing attorney had a part-time avocation and hobby of being a registered PIAA [Pennsylvania Interscholastic Athletic Association] high school football official for approximately 22 years. He was assigned on September 25, 1981 as part of a five man officiating crew to referee a football game between the District, the home team, and Norwin High School. With seven seconds remaining in the game, Lynch was allegedly injured when he was "trapped" in a play situation and pushed off his right leg in order to

LAW REVIEW APRIL 1992

avoid the ball carrier. His doctor, subsequently, described his injury as a partial tear of his calf muscle. [Lynch alleged that this injury ultimately caused the amputation of his lower right leg in 1982.]

The specific issue on appeal was, therefore, "whether a football official's relationship, either on the high school or college/university level is that of an employee or independent contractor of a high school or college/university for the purpose of workmen's compensation."

As described by the court, "the law in determining whether a relationship is either employer-employee or an independent contractor" was as follows:

In determining whether a relationship is one of employer-employee or independent contractor, certain factors will be considered which, while not controlling, serve as general guidance to the Court. These factors include: the control of the manner that work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; the skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether the work is part of the regular business of the employer, and the right to terminate the employment at any time.

However, the right to control is the most persuasive indication of one or the other. The first and probably most important factor is control of the manner in which the work is accomplished. The traditional test of the employer-employee relation is the right of the employer to control the details of the work.

As noted by the court, the Workmen's Compensation Board had based its conclusion that Lynch was not an employee of the District on the following evidence:

- (a) He was paid by the job, not by the time spent doing the job, and no deductions were made from his pay,
- (b) He was required to possess a certain skill to be a referee which skills are not possessed by people who are not so trained.
- (c) He did in fact perform a similar service for other schools and organizations during the same season even after the so called work injury,
- (d) He supplied his own clothing, flags, shoes and whistle,
- (e) The home team had no right to dismiss the official at any time.

LAW REVIEW APRIL 1992

No proof was submitted where an official was dismissed during a game by the home team and there is no proof that the principal of the home team at any school, anywhere, ever directed an official to change a ruling made on the field,

(f) The result of the work of the official is not intended to benefit the home team and in fact the official cannot be so directed,

(g) The home team did not reserve to itself the right to direct the manner in which the work was done.

On appeal, Lynch maintained that "he was an employee of the District in its game with Norwin High School on September 25, 1981." As characterized by the court, Lynch contended further that "if assigned his usual twelve games per season at different high schools, each of the home teams would be his employer for the purpose of workmen's compensation."

According to the court, Lynch had "the burden to establish the employer-employee relationship to qualify for workmen's compensation." In this particular instance, Lynch argued that an employer-employee relationship was produced by the following "comprehensive relationships of the various associations governing the public and private high schools' interscholastic athletic contests throughout the United States." The appeals court described these relationships and "the responsibilities of the game officials assigned to officiate in various sports, including football games" as follows:

The top governing body is the National Federation of State High School Associations (Federation) of which the high schools in the fifty states are members through their membership in the state associations. The PIAA, in the instant case, represents the District and other Pennsylvania high schools in the Federation. The Federation promulgates the rules for all high school sports, including football. All high schools are required to conduct their contests under the official playing rules enacted and published by the Federation. Also, the game officials, under whose supervision the football game is played, are required to have a thorough knowledge of the rules and officiate the game in accordance with said rules as well as the approximately sixty page Federation's Football Officials' Manual (Manual). The Manual sets forth the prerequisites for good officiating, mechanics of officiating, standard officials' uniforms, equipment (whistle, penalty marker, game card, pencil, bean bag to mark the spot of fumbles, and rubber bands to keep track of the number of downs), pre-game conferences and conduct relating to the officials' contacts with coaches and the public media. The PIAA Athletic Officials' Manual seeks to promote uniformity in all interscholastic sports competition and implements the Manual relating to football. The District herein provided all the physical equipment to conduct the game, including the field, game ball, score board, line to gain chains and field clock.

Under the PIAA constitution, all registered football officials are required to affiliate with a local PIAA chapter, attend six chapter meetings, three before and three during the

LAW REVIEW APRIL 1992

season, and, attend at least one annual interpretation meeting before the start of the football season. Lynch was required to pay dues to the PIAA, pass a yearly examination to establish his competency as an official and was assigned to officiate approximately twelve games in advance of the football season. He could not refuse an assignment without good cause, i.e. serious illness or a death in the family.

Further, under the PIAA constitution, the high school principal has overall control of all interscholastic athletic relationships in which the school participates. The District, at the time relevant herein, was a member of the Foothills Football Conference (Conference) made up of ten high schools in the Westmoreland County area, which competed against each other...

The District and all other high schools in Pennsylvania, with few exceptions, belong to the PIAA. The Conference appointed a Commissioner, a retired football official who was not paid, to make assignments of football officials for the member schools' football games. After the games, the coaches submitted rating reports to the Commissioner, who, based on his personal evaluation and the said ratings, determined the status and future assignments of officials. During the 1981 football season, the officials were paid a flat fee of \$ 30 per game by the home team, not the PIAA. The fee was negotiated by the officials' association and the Conference, not by the District or individual officials.

In the opinion of the court, "[a] substantial number of the facts set forth above are not supportive of Lynch's position." Specifically, the court found "no evidence to indicate that the District had, or exercised, any control whatsoever over the manner in which Lynch and the other officials performed their duties during the game."

[I]n determining whether a relationship is one of employer-employee or independent contractor, no one test standing alone, except the right of control of the manner of the work to be done, is decisive. The critical question, without the trappings, is whether Lynch's assignment to officiate the District's game gave the District the right to control and supervise the manner and method by which Lynch was to officiate the game after it started. In this case, the right of control of the officiating is properly tested by the manner and work of the officials during the course of the entire game.

Consequently, the court rejected Lynch's argument that "all of the rules and regulations set forth in the Federation's football rules, and the PIAA's manuals, rise to the level of providing the District the right to control and direct the manner of how the officiating shall be conducted during a football game."

Under the Federation's rules, the officials' jurisdiction over the game begins with the scheduled coin toss at midfield and ends when the referee declares the score final. The game is played under the supervision of the officials. All officials are responsible for decisions involving the application of rules, as well as their interpretation or enforcement. Often Lynch was required to make judgment calls, and it was his and the other officials'

LAW REVIEW APRIL 1992

judgment alone which governed. The District did not choose Lynch as a referee for their game on September 25, 1981. They had to take whoever the Commissioner assigned for that game. The fact that the District paid the referee is not indicative of either type of relationship while the fact that Lynch was paid for a specified piece of work as an official is indicative of an independent contractor relationship.

Once the game started, the District exercised no control over Lynch or the other officials. Lynch was paid for one football game regardless of how long it took to play it. The game fee was paid shortly before the start of the game by the Athletic Director of the District. The officials were not on the District's payroll and no deductions were taken from their fee for taxes or social security. They were not given the benefits which other District employees received. They bought their own uniforms, shoes, hats, whistles and penalty markers, and provided their own medical insurance.

Based upon these facts, the court, therefore, concluded that "the District had no control over Lynch or the other officials once the game started." In the opinion of the court such a relationship was appropriate "because the very essence of the officials' position during a game requires that the officials be free from control by the District, the home team, or its opponent."

To hold otherwise would subject the officials to influence by their employer's desires, to wit, the District, or any other high school when it is the home team. The officials must remain neutral and avoid any appearance of impropriety during the game, on and off the field. Thus, it is the right to control, not the actual control that is the deciding factor in the instant case.

Accordingly, the court found it "clear that the District exercised no control over the manner in which Lynch performed his work as an official during the game, that the method of payment was indicative of an independent contractor status, that no equipment was furnished to Lynch and the District had no right to discharge him." As a result, the appeals court affirmed the order of the Workmen's Compensation Board denying Lynch's claim against the District.