8-40-202. Employee.

(1) "Employee" means:

(a) (I) (A) Every person in the service of the state, or of any county, city, town, or irrigation, drainage, or school district or any other taxing district therein, or of any public institution or administrative board thereof under any appointment or contract of hire, express or implied; and every elective official of the state, or of any county, city, town, or irrigation, drainage, or school district or any other taxing district therein, or of any public institution or administrative board thereof; and every member of the military forces of the state of Colorado while engaged in active service on behalf of the state under orders from competent authority. Police officers and firefighters who are regularly employed shall be deemed employees within the meaning of this paragraph (a), as shall also sheriffs and deputy sheriffs, regularly employed, and all persons called to serve upon any posse in pursuance of the provisions of section 30-10-516, C.R.S., during the period of their service upon such posse, and all members of volunteer fire departments, including any person receiving a retirement pension under section 31-30-1122, C.R.S., who serves as an active volunteer firefighter of a fire department subsequent to retirement pursuant to section 31-30-1132, C.R.S., or any person ordered by the chief or a designee of the chief's at the scene of an emergency or during the period of an emergency to become a member of that department for the duration of an emergency, and to perform the duties of a firefighter, and only if the person who is so ordered reports any claim within ten days of the cessation of the emergency, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams in any county, city, town, municipality, or legally organized fire protection district or ambulance district in the state of Colorado, and all members of the civil air patrol, Colorado wing, while said persons are actually performing duties as volunteer firefighters or as members of such volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, or volunteer search teams or as members of the civil air patrol, Colorado wing, and while engaged in organized drills, practice, or training necessary or proper for the performance of such duties. Members of volunteer police departments, volunteer police reserves, and volunteer police teams or groups in any county, city, town, or municipality, while actually performing duties as volunteer police officers, may be deemed employees within the meaning of this paragraph (a) at the option of the governing body of such county or municipality.

(B) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (I), any elected or appointed official of any county, city, town, or irrigation, drainage, or school district or taxing district who receives no compensation for service rendered as such an official, other than reimbursement of actual expenses, may be deemed not to be an employee within the meaning of this paragraph (a) at the option of the governing body of such county, city, town, or district. The option to exclude such officials as employees within the meaning of this paragraph (a) may be exercised as to any category of officials or as to any combination of categories of officials. Any such option may be exercised for any policy year by the filing of a statement with the division not less than forty-five days before the start of the policy year for which the option is to be exercised. If such a statement is in effect as to any category of such uncompensated officials, no official in said category shall be deemed an employee within the meaning of this paragraph (a). The governing body shall notify each official of such action promptly at the time such election to exclude is exercised.

(II) The rate of compensation of such persons accidentally injured, or, if killed, the rate of compensation for their dependents, while serving upon such posse or as volunteer firefighters or as members of such volunteer police departments, volunteer police reserves, or volunteer police teams or groups or as

members of such volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, or volunteer search teams or as members of the civil air patrol, Colorado wing, and of every nonsalaried person in the service of the state, or of any county, city, town, or irrigation, drainage, or school district therein, or of any public institution or administrative board thereof under any appointment or contract of hire, express or implied, including nonsalaried elective officials of the state, and of all members of the military forces of the state of Colorado shall be at the maximum rate provided by articles 40 to 47 of this title; except that this subparagraph (II) shall apply to an official described in sub-subparagraph (B) of subparagraph (I) of this paragraph (a) only if no statement exercising the option to exclude such official as an employee within the meaning of this paragraph (a) is in effect.

(III) Any person who, as part of a rehabilitation program of the social services department of any county or city and county, is placed with a private employer for the purpose of training or learning trades or occupations shall be deemed while so engaged to be an employee of such private employer. Any person who receives a work experience assignment to a position in any department or agency of any county or municipality, in any school district, in the office of any state agency or political subdivision thereof, or in any private for profit or any nonprofit agency pursuant to the provisions of part 7 of article 2 of title 26, C.R.S., shall be deemed while so assigned to be an employee of the respective department, agency, office, political subdivision, private for profit or nonprofit agency, or school district to which said person is assigned or, if so negotiated between the county and the entity to which the person is assigned, of the county arranging the work experience assignment. Any person who receives a work experience assignment to a position in any federal office or agency pursuant to part 7 of article 2 of title 26, C.R.S., shall be deemed while so assigned to be an employee of the county arranging the work experience assignment. The rate of compensation for such persons if accidentally injured or, if killed, for their dependents shall be based upon the wages normally paid in the community in which they reside for the type of work in which they are engaged at the time of such injury or death; except that, if any such person is a minor, compensation to such minor for permanent disability, if any, or death benefits to such minor's dependents shall be paid at the maximum rate of compensation payable under articles 40 to 47 of this title at the time of the determination of such disability or of such death.

(IV) Except as provided in section 8-40-301 (3) and section 8-40-302 (7) (a), any person who may at any time be receiving training under any work or job training or rehabilitation program sponsored by any department, board, commission, or institution of the state of Colorado or of any county, city and county, city, town, school district, or private or parochial school or college and who, as part of any such work or job training or rehabilitation program of any department, board, commission, or institution of the state of Colorado or of any county, city and county, city, town, school district, or private or parochial school or college, is placed with any employer for the purpose of training or learning trades or occupations shall be deemed while so engaged to be an employee of the respective department, board, commission, or institution of the state of Colorado or of the county, city and county, city, town, school district, or private or parochial school or college sponsoring such training or rehabilitation program unless the following conditions are met, in which case the placed person shall be deemed an employee of the employer with whom he or she is placed:

(A) The sponsoring entity and the employer agree that the employer shall cover the placed person under the employer's workers' compensation insurance;

(B) The employer does in fact insure and keep insured its liability for workers' compensation as provided in articles 40 to 47 of this title and does in fact cover the placed person under such insurance; and

(C) With respect to agreements between sponsoring entities and employers entered into after April 1, 1991, the employer has been provided with notice of the provisions of this subparagraph (IV) and of subparagraphs (V) and (VI) of this paragraph (a).

(V) In the event a person placed with an employer is deemed an employee of the employer pursuant to subparagraph (IV) of this paragraph (a), the sponsoring entity shall not be subject to any liability for or on account of the death of or personal injury to the person so placed. In the event such person is deemed an employee of the sponsoring entity pursuant to the said subparagraph (IV), the employer shall not be subject to any liability for or on account of the death of or personal injury to the person and shall not be required to carry workers' compensation insurance or to pay premiums for workers' compensation insurance with respect to the person.

(VI) The rate of compensation for a person placed pursuant to subparagraph (IV) of this paragraph (a) if accidentally injured or, if killed, for dependents of such person shall be based upon the wages normally paid in the community in which such person resides or in the community where said work or job training or rehabilitation program is being conducted for the type of work in which the person is engaged at the time of such injury or death, as determined by the director; except that, if any such person is a minor, compensation for such minor for permanent disability, if any, or death benefits to such minor's dependents shall be paid at the maximum rate of compensation payable under articles 40 to 47 of this title at the time of the determination of such disability or death.

(b) Every person in the service of any person, association of persons, firm, or private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, under any contract of hire, express or implied, including aliens and also including minors, whether lawfully or unlawfully employed, who for the purpose of articles 40 to 47 of this title are considered the same and have the same power of contracting with respect to their employment as adult employees, but not including any persons who are expressly excluded from articles 40 to 47 of this title or whose employment is but casual and not in the usual course of the trade, business, profession, or occupation of the employer. The following persons shall also be deemed employees and entitled to benefits at the maximum rate provided by said articles, and, in the event of injury or death, their dependents shall likewise be entitled to such maximum benefits, if and when the association, team, group, or organization to which they belong has elected to become subject to articles 40 to 47 of this title and has insured its liability under said articles: All members of privately organized volunteer fire departments, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams and organizations while performing their respective duties as members of such privately organized volunteer fire departments, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams and organizations and while engaged in organized drills, practice, or training necessary or proper for the performance of their respective duties.

(2) (a) Notwithstanding any other provision of this section, any individual who performs services for pay for another shall be deemed to be an employee, irrespective of whether the common-law relationship of master and servant exists, unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service shall not be considered if such control is exercised pursuant to the requirements of any state or federal statute or regulation.

(b) (I) To prove that an individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service, the individual and the person for whom services are performed may show by a preponderance of the evidence that the conditions set forth in paragraph (a) of this subsection (2) have been satisfied. The parties may also prove independence through a written document.

(II) To prove independence it must be shown that the person for whom services are performed does not:

(A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;

(B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

(C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;

(D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

(E) Provide more than minimal training for the individual;

(F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

(H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

(III) A document may satisfy the requirements of this paragraph (b) if such document demonstrates by a preponderance of the evidence the existence of the factors listed in subparagraph (II) of this paragraph (b) as are appropriate to the parties' situation. The existence of any one of these factors is not conclusive evidence that the individual is an employee.

(IV) If the parties use a written document pursuant to this paragraph (b), such document must be signed by both parties and may be the contract for performance of service or a separate document. Such document shall create a rebuttable presumption of an independent contractor relationship between the parties where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers' compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. All signatures on any such document must be duly notarized.

(V) If the parties use a written document pursuant to this paragraph (b) and one of the parties is a professional whose license to practice a particular occupation under the laws of the state of Colorado requires such professional to exercise a supervisory function with regard to an entire project such supervisory role shall not affect such professional's status as part of the independent contractor relationship.

(c) Nothing in this section shall be construed to conflict with section 8-40-301 or to relieve any obligations imposed pursuant thereto.

(d) Nothing in this section shall be construed to remove the claimant's burden of proving the existence of an employer-employee relationship for purposes of receiving benefits pursuant to articles 40 to 47 of this title.

(e) (I) Notwithstanding any other provision of this section, a written agreement between a nonprofit youth sports organization and a coach, specifying that the coach is an independent contractor and not an employee of the nonprofit youth sports organization and otherwise satisfying the requirements of this paragraph (e), shall be conclusive evidence that the relationship between the nonprofit youth sports organization and the coach is an independent contractor relationship rather than an employment relationship and that the nonprofit youth sports organization is not obligated to secure compensation for the coach in accordance with the "Workers' Compensation Act of Colorado".

(II) The written agreement shall contain a disclosure, in bold-faced, underlined, or large type, in a conspicuous location, and acknowledged by the parties by signature, initials, or other means demonstrating that the parties have read and understand the disclosure, indicating that the coach:

(A) Is an independent contractor and not an employee of the nonprofit youth sports organization;

(B) Is not entitled to workers' compensation benefits in connection with his or her contract with the nonprofit youth sports organization; and

(C) Is obligated to pay federal and state income tax on any moneys paid pursuant to the contract for coaching services and that the nonprofit youth sports organization will not withhold any amounts from the coach for purposes of satisfying the coach's income tax liability.

(III) A written agreement between a nonprofit youth sports organization and a coach in accordance with this paragraph (e) shall not be conclusive evidence of an independent contractor relationship for purposes of any civil action instituted by a third party.

(IV) As used in this paragraph (e), "nonprofit youth sports organization" means an organization that is exempt from federal taxation under section 501 (c) (3) of the federal "Internal Revenue Code of 1986", as amended, and is primarily engaged in conducting organized sports programs for persons under twenty-one years of age.

(3) Notwithstanding any other provision of this section, "employee" includes a person who participates in a property tax work-off program established pursuant to article 3.7 of title 39, C.R.S.

Source: L. 90: Entire article R&RE, p. 470, § 1, effective July 1. **L. 91:** (1)(a)(IV) amended, p. 1364, § 1, effective April 20; (1)(a)(III) amended, p. 1870, § 23, effective July 1. **L. 93:** (2) added, p. 356, § 2, effective April 12. **L. 94:** (1)(a)(III) amended, p. 452, § 2, effective March 29. **L. 95:** IP(2)(b)(II), (2)(b)(III), and (2)(b)(IV) amended, pp. 343, 344, § 2, effective July 1. **L. 97:** (1)(a)(I)(A) amended, p. 170, § 3, effective March 28; (1)(a)(III) amended, p. 1239, § 35, effective July 1; (1)(a)(I)(A) and (1)(a)(II) amended, p. 1005, § 2, effective August 6. **L. 2010:** (2)(e) added, (HB 10-1108), ch. 119, p. 400, § 2, effective April 15; (3) added, (HB 10-1076), ch. 162, p. 566, § 1, effective August 11.

Editor's note: (1) This section is similar to former § 8-41-106 as it existed prior to 1990.

(2) Amendments to subsection (1)(a)(I)(A) by House Bill 97-1220 and Senate Bill 97-166 were harmonized.

Cross references: (1) For the scope of the term "employee", see § 8-40-301.

(2) For the legislative declaration in the 2010 act adding subsection (2)(e), see section 1 of chapter 119, Session Laws of Colorado 2010.

ANNOTATION

Analysis

I. GENERAL CONSIDERATION.

Am. Jur.2d. See 82 Am. Jur.2d, Workers' Compensation, §§ 125-159.

C.J.S. See 99 C.J.S., Workers' Compensation, §§ 100-113, 135-233.

Law reviews. For article, "Independent Contractors and the Colorado Workers' Compensation Act -- Parts I and II", see 22 Colo. Law. 545 and 1281 (1993). For article, "Independent Contractors in Colorado", see 34 Colo. Law. 53 (Dec. 2005).

Annotator's note. (1) Since § 8-40-202 is similar to § 8-41-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section. For additional cases, see the annotations under former § 8-41-106 in the 1986 replacement volume.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its powers, duties, and functions under the act to the industrial claim appeals office.

A governing body of the county or municipality must provide worker's compensation to a voluntary peace officer. The statutory language granting a county or municipality the option to not provide such coverage was repealed by implication by § 16-2.5-110, which requires the reserve peace officers to be provided with worker's compensation benefits. City of Florence v. Pepper, 145 P.3d 654 (Colo. 2006).

Proper characterization of the employer-employee relationship depends on the facts of each case and is for the commission to determine. Melnick v. Indus. Comm'n, 656 P.2d 1318 (Colo. App. 1982).

To reap the benefits under the workmen's compensation act, a person must in fact first be an employee under the statutory definition. Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

The definition of employee is broad and obviously was so intended by the general assembly. Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Doyle v. Missouri Valley Constructors, Inc., 288 F. Supp. 121 (D. Colo. 1968).

The compensation act emphasizes the objective of protection of employees and in carrying out this objective gives a broad interpretation to the term "employee". Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed.2d 644 (1974).

And even though the purpose of the workmen's compensation act is to protect all workmen, save those specifically excluded. Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).

The definition of an employee entitled to coverage under this act includes "aliens" without distinguishing between legal and illegal aliens and therefore does not preclude, as a matter of law, an illegal alien from proving

an entitlement to benefits. Champion Auto Body v. Indus. Claim Appeals Office, 950 P.2d 671 (Colo. App. 1997).

General contractor remains statutory employer of subcontractor's employee and is entitled to a corresponding immunity from suit, despite the fact that the subcontractor is an independent contractor of the general contractor. Frank M. Hall & Co. v. Newsom, 125 P.3d 444 (Colo. 2005).

One cannot be his own employee. Indus. Comm'n v. Bracken, 83 Colo. 72, 262 P. 521 (1927).

"Employee" does not include one injured during pre-employment testing. Applicant who was not under contract as an employee at the time of the accident is not an employee. Younger v. City and County of Denver, 796 P.2d 38 (Colo. App. 1990); Younger v. City and County of Denver, 810 P.2d 647 (Colo. 1991).

"Appointment", as used in the definition of employee set forth in subsection (1) (a) requires that the person making the designation be vested with authority and the designation be for the purpose of discharging the duty of some office or trust. A volunteer pitching coach permitted by a head baseball coach to work with the high school baseball team is not an employee subjecting the school district to workers' compensation liability since school district, and not head coach, is authorized to create additional coaching positions and a volunteer pitching coach position is not an office. Mesa County Valley Sch. D. 51 v. Goletz, 821 P.2d 785 (Colo. 1991).

Three requirements are set forth, any two of which when met can qualify an employee, as the term is used in the statutes, as coming under the workmen's compensation act. They are: (1) A contract of employment created in the state; (2) employment in the state under a contract created outside the state; and (3) substantial employment in the state. If any two of these conditions are met it makes no difference that the employee is not a resident of the state or is killed outside the state provided other statutory time limits on out-of-state employment are met. Platt v. Reynolds, 86 Colo. 397, 282 P. 264 (1929); Tripp v. Indus. Comm'n, 89 Colo. 512, 4 P.2d 917 (1931); Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

"Employee" entitled to workers' compensation benefits is a worker who performs a substantial portion of his work in this state and who is either injured in an accident in this state or has a contract in this state. Loffland Bros. Co. v. Indus. Comm'n, 714 P.2d 509 (Colo. App. 1985).

In determining whether or not a claimant is an employee, the measure of his compensation is not a controlling factor. De Beque Producers' Ass'n v. Indus. Comm'n, 83 Colo. 158, 262 P. 1019 (1928).

For in the statutory definition of employee there is no requirement that a salary be paid for the service rendered. Lyttle v. State Comp. Ins. Fund, 137 Colo. 212, 322 P.2d 1049 (1958).

An unpaid student intern must be deemed a "person placed pursuant to" subparagraph (1)(a)(IV) and is thus entitled to an imputed wage under subparagraph (1)(a)(VI) for purposes of calculating medical impairment benefits, notwithstanding the exception in subparagraph (1)(A)(IV), which exception relates only to who shall be deemed the employer, not whether an employee is entitled to an imputed wage. Kinder v. Indus. Claim Appeals Office, 976 P.2d 295 (Colo. App. 1998).

Whether an injured workman is an employee is a question of fact. New Jersey Fid. & Plate Glass Ins. Co. v. Patterson, 86 Colo. 580, 284 P. 334 (1929); Sch. Dist. No. 60 v. Indus. Comm'n, 43 Colo. App. 38, 601 P.2d 651 (1979).

Determination of type of employee deemed question of law. Where the facts are undisputed, the question of whether an individual is an employee as defined by this section, or a constructive employee to whom work has been contracted out as defined by § 8-48-101 (1), is a question of law, not a question of fact. Univ. of Colo. Med. Center v. Indus. Comm'n, 622 P.2d 596 (Colo. App. 1980).

And the finding on conflicting evidence is conclusive on review. De Beque Producers' Ass'n v. Indus. Comm'n, 83 Colo. 158, 262 P. 1019 (1928); New Jersey Fid. & Plate Glass Ins. Co. v. Patterson, 86 Colo. 580, 284 P. 334 (1929).

Moreover, where various findings are made, the last finding is conclusive. In a workmen's compensation case, although the commission and its referee made three different findings of fact, this did not nullify the rule that the last finding is conclusive. Indus. Comm'n v. Aetna Life Ins. Co., 88 Colo. 82, 292 P. 229 (1930).

So also fact findings sufficiently supported by the evidence will not be disturbed on review. State Comp.

Ins. Fund v. Indus. Comm'n, 95 Colo. 309, 35 P.2d 849 (1934); London Guarantee & Accident Co. v. Indus. Comm'n, 95 Colo. 306, 35 P.2d 1010 (1934).

And a court exceeds its jurisdiction in a workmen's compensation case if it attempts to pass upon the weight of the evidence introduced before the director. Indus. Comm'n v. Aetna Life Ins. Co., 88 Colo. 82, 292 P. 229 (1930).

One may be employee by virtue of the statute and not by common-law definition. An obligation to pay workmen's compensation may, in proper cases, be imposed against an owner where the common-law relationship of employer and employee does not exist, in that one may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition. Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed.2d 644 (1974).

Award of benefits of regular employee controlled by section. Where nurse claiming benefits was a regular employee of the University of Colorado Medical Center, subsection (1)(a)(I) controlled the award of benefits as opposed to § 8-48-101 (1). Univ. of Colo. Medical Center v. Indus. Comm'n, 622 P.2d 596 (Colo. App. 1980).

Award based upon erroneous interpretation of law sustained if award proper absent misinterpretation. Even though a court may determine that the industrial commission erroneously interpreted the law, if the commission's award would have been correct had the law been properly interpreted, that award will be sustained. Univ. of Colo. Med. Center v. Indus. Comm'n, 622 P.2d 596 (Colo. App. 1980).

Applied in Kalmon v. Indus. Comm'n, 41 Colo. App. 259, 583 P.2d 946 (1978); Ellis v. Rocky Mt. Empire Sports, Inc., 43 Colo. App. 166, 602 P.2d 895 (1979); Peterson v. Trailways, Inc., 555 F. Supp. 827 (D. Colo. 1983); AGS Mach. Co. v. Indus. Comm'n, 670 P.2d 816 (Colo. App. 1983).

II. EMPLOYEE OR INDEPENDENT CONTRACTOR.

Subsection (1)(b) contemplates contractual and quasi-contractual relationships created by estoppel, and should be interpreted broadly to protect workers. Olsen v. Indus. Claim Appeals Office, 819 P.2d 544 (Colo. App. 1991).

"Contractor" is not necessarily outside of the category of "employee". The term "employee" has both a narrow, specific, and a wider generic meaning. Indus. Comm'n v. Cont'l Inv. Co., 78 Colo. 399, 242 P. 49 (1925).

But factors to be considered in determining whether one performing labor for another is a servant or a contractor are: Does the workman give all or only a part of his time to the work; does the contract contemplate labor on the job, or completion; has the laborer or the employee control of the details; which may employ, control, and discharge assistants; which furnishes the necessary tools and equipment; may either terminate the employment without liability to the others; is compensation measured by time, by piece, or by lump sum? Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963).

There are two tests for determining whether a worker is an actual employee or an independent contractor: the "control" test and the "relative nature of the work" test, and if either test is satisfied the worker is an employee. Stampados v. Colo. D & S Enters., 833 P.2d 815 (Colo. App. 1992).

The definition of an "independent contractor" in § 40-11.5-102 was intended to apply to the Workers' Compensation Act. Frank C. Klein & Co. v. Colo. Comp. Ins. Auth., 859 P.2d 323 (Colo. App. 1993).

A servant is one whose employer has the order and control of work done by him and who directs or may direct the means as well as the end. Arnold v. Lawrence, 72 Colo. 528, 213 P. 129 (1923); Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

And it is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934); Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Faith Realty & Dev. Co. v. Indus. Comm'n, 170 Colo. 215, 460 P.2d 228 (1969).

The right immediately to discharge involves the right of control. Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956).

Thus the most important point in determining the question of contractor or employee is the right to terminate the relation without liability. Indus. Comm'n v. Hammond, 77 Colo. 414, 236 P. 1006 (1925); Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Brush Hay Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963); Faith Realty & Dev. Co. v. Indus. Comm'n, 170 Colo. 215, 460 P.2d 228 (1969).

For the absolute right to terminate the relationship without liability is inconsistent with the concept of independent contractor. Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956).

Where compensation is based upon time or piece the workman is usually a servant and where it is based upon a lump sum for the task he is usually a contractor. Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963).

A person may be determined to be an independent contractor even if all nine criteria outlined in subsection (2)(b)(II) are not established. Nelson v. Indus. Claim Appeals Office, 981 P.2d 210 (Colo. App. 1998).

Presumption of independent contractor status recognized in subsection (5) may be overcome by clear and convincing evidence of control over the means and methods of performance that are wholly unrelated to the achievement of the end contracted for. Frank C. Klein & Co. v. Colo. Comp. Ins. Auth., 859 P.2d 323 (Colo. App. 1993).

Ski patrol worker who negotiated for a ski pass in lieu of salary in exchange for services was not a "volunteer" for purpose of exclusion from coverage under this article. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

If the facts are undisputed as to whether a workman is an employee or a contractor, the question is one of law. Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925).

And may be reviewed by the supreme court. Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963).

But if the question of whether workman was employee or independent contractor is one of fact, to be determined from conflicting evidence, it is for the commission. Whitney v. Mountain States Motors Co., 106 Colo. 184, 102 P.2d 743 (1940); Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963).

Claimant's relationship with newspaper publisher was an employment relationship where the newspaper exercised control over claimant by directing the time and place of newspaper delivery and delivery of newspapers was not a separate enterprise from the business of the newspaper. Contract which characterized claimant as an independent contractor was not controlling. Olsen v. Indus. Claim Appeals Office, 819 P.2d 544 (Colo. App. 1991).

Acceptance of premiums by insurance fund for employee made fund liable for claim. Actions of the state compensation insurance fund, which accepted workmen's compensation premium payments from employer based on employee status of carpenter constructing employer's private residence and which did not give employer notice that premium payment was accepted subject to appeal of determination that carpenter was employer's employee for workmen's compensation purposes, constituted conduct which would convey impression that the fund intended to cover carpenter's workmen's compensation claim; therefore, the fund was liable for workmen's compensation benefits awarded carpenter. Drake v. Ins. Co. of North America, 736 P.2d 1244 (Colo. App. 1986).

Instances of employees. Indus. Comm'n v. Globe Indem. Co., 77 Colo. 251, 235 P. 576 (1925); Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925); De Beque Producers' Ass'n v. Indus. Comm'n, 83 Colo. 158, 262 P. 1019 (1928); State Comp. Ins. Fund v. Indus. Comm'n, 95 Colo. 309, 35 P.2d 849 (1934); Indus. Comm'n v. Sontarelli, 109 Colo. 84, 122 P.2d 239 (1942); Kampt v. Disney, 110 Colo. 518, 135 P.2d 1019 (1943); Neely-Towner Motor Co. v. Indus. Comm'n, 123 Colo. 472, 230 P.2d 993 (1951); Indus. Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Faith Realty & Dev. Co. v. Indus. Comm'n, 170 Colo. 215, 460 P.2d 228 (1969).

Instances of independent contractor. Indus. Comm'n v. Cont'l Inv. Co., 78 Colo. 399, 242 P. 49 (1925); London Guarantee & Accident Co. v. Indus. Comm'n, 95 Colo. 306, 35 P.2d 1010 (1934); Whitney v. Mountain States Motors Co., 106 Colo. 184, 102 P.2d 743 (1940); Warner v. Messick, 108 Colo. 342, 117 P.2d 482 (1941); Wilkowski v. Indus. Comm'n, 113 Colo. 46, 154 P.2d 615 (1944); Brush Hay & Milling Co. v. Small, 154 Colo. 11, 388 P.2d 84 (1963); Sands v. Indus. Comm'n, 160 Colo. 42, 413 P.2d 702 (1966).

Subsection (2) cited in Frank C. Klein & Co. v. Colo. Comp. Ins. Auth., 859 P.2d 323 (Colo. App. 1993).

III. CONTRACT FOR HIRE.

The requirement of contract of hire was written into the workmen's compensation act for two reasons: First, the necessity for a "contract" was felt to insure than an employee did not give up legal rights against an employer without receiving value in return; and second, the contract had to be one "of hire" because, absent the expectation of remuneration at some rate, there was no way to compute benefits. Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

And § 8-41-105 and this section speak of "any contract of hire, express or implied", indicating that several "contracts of hire" may exist in a given situation and recovery had upon "any". Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

Thus, both an express and implied "contract of hire" could exist between the same parties but covering different employment or covering the same employment but with differing parties. Rocky Mt. Dairy Prods. v. Pease, 161 Colo. 216, 422 P.2d 630 (1966).

When a claim is filed under the workmen's compensation act, the burden of proof is upon the claimant to prove that he was an employee by showing the existence of a contract of hire. Hall v. State Comp. Ins. Fund, 154 Colo. 47, 387 P.2d 899 (1963).

And where the evidence does not disclose any contractual obligation, then the employer-employee relationship does not exist and there is no contract which would support a claim for compensation under the act. State Comp. Ins. Fund v. Indus. Comm'n, 135 Colo. 570, 314 P.2d 288 (1957); Hall v. State Comp. Ins. Fund, 154 Colo. 47, 387 P.2d 899 (1963).

Claimant who received a ski pass for use by another person was an employee since the pass is a benefit comprising compensation. The lack of any wages as defined in § 8-40-201 (19) does not mean that no "contract of hire" exists under subsection (1)(b). Aspen Highlands Skiing Corp. v. Apostolou, 854 P.2d 1357 (Colo. App. 1992).

A contract of hire may be formed as long as the fundamental elements of contract formation are present even though not every formality attending commercial contractual arrangements is observed. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

Contract of hire found to exist where claimant was part-time ski patrol worker who agreed to work only in exchange for the benefit of daily ski pass in lieu of salary and who worked under the direction of the employer. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

IV. PUBLIC EMPLOYEES.

The statutory definition of "employees" includes employees of the state. Myers v. State, 162 Colo. 435, 428 P.2d 83 (1967).

And if working for a public employer must be a "public employee". Under the statutory classification of employer and employee, before a claimant can fix liability on a public employer, under the workmen's compensation act, for compensation for accidental injuries, he must be within the designation of "public employee". Indus. Comm'n v. State Comp. Ins. Fund, 94 Colo. 194, 29 P.2d 372 (1934).

All workers in service of the state are treated as state "employees", not as employees of separate entities, for purposes of workers' compensation benefits. Rodriguez v. Bd. of Dirs., 917 P.2d 358 (Colo. App. 1996).

Public employees. No intent can be found in the general assembly through the pertinent provisions of the workmen's compensation law to make any distinction in the classification of public employees between those who

are engaged in governmental functions and those who are engaged in the proprietary branch of a political subdivision. The basic distinction of the act is between public employees and private employees. State Comp. Ins. Fund v. Alishio, 125 Colo. 242, 250 P.2d 1015 (1952).

A governmental entity cannot be a constructive employer pursuant to § 8-48-101 (1). Antal v. Delta County Mosquito Control Dist. No. 1, 644 P.2d 87 (Colo. App. 1982).

Inmates are not employees of state or county. Orr v. Indus. Comm'n, 691 P.2d 1145 (Colo. App. 1984), att'd, 716 P.2d 1106 (Colo. 1986).

City as employer. State Comp. Ins. Fund v. Alishio, 125 Colo. 242, 250 P.2d 1015 (1952).

An unsalaried member of a state board or commission is an employee of the state, and within the coverage of the workmen's compensation law, and had the general assembly intended to exclude such persons from coverage, language other than the words actually used would have been employed. Lyttle v. State Comp. Ins. Fund, 137 Colo. 212, 322 P.2d 1049 (1958).

Furthermore, it is evident that the intent of the general assembly was to provide that the employees and appointees of the county, as specified therein, together with all nonsalaried employees, should be paid at the maximum rate of compensation. State Comp. Ins. Fund v. Keane, 160 Colo. 292, 417 P.2d 8 (1966).

The status of a juror is not that of an employee serving under this section, by "appointment or contract of hire, express or implied". The legislative branch of the government has not said that a juror is an employee of the county, and it does not lie with the judicial branch to belittle the functions of his great office by so declaring. Bd. of Comm'rs v. Evans, 99 Colo. 83, 60 P.2d 225 (1936).

Employer of student teachers. Section 22-62-105 (2) deems a school district the employer of a student teacher whereas the general provision of subsection (1)(a)(IV) of this section designates the sponsoring institution as the employer of its job trainees. Section 22-62-105 (2) merely shifts workmen's compensation liability for injury to student teachers to a different institution; where applicable, it is a legally enforceable specific exception to the general rule prescribed by subsection (1)(a)(IV). Sch. Dist. No. 60 v. Indus. Comm'n, 43 Colo. App. 38, 601 P.2d 651 (1979).

Claimant was participating as a volunteer fireman, and not merely as a patriotic citizen, at the time of his injury, while participating in a public patriotic celebration. Northwest Conejos Fire Prot. Dist. v. Indus. Comm'n, 39 Colo. App. 367, 566 P.2d 717 (1977).

The rate of compensation for persons accidentally injured while serving as volunteer firefighters shall be at the maximum rate provided by the Workers' Compensation Act. Subsection (1)(a)(II) creates an exception to the usual measure of calculating disability benefits. To the extent that subsection (1)(a)(II) gives injured volunteer firefighters a windfall, such a result has been mandated by the general assembly. Parker Fire Prot. Dist. v. Poage, 843 P.2d 108 (Colo. App. 1992).

Volunteer member of civil air patrol traveling on duty to attend organized training when injured suffers an injury which arises out of and in the course of his employment. Colo. Civil Air Patrol v. Hagans, 662 P.2d 194 (Colo. App. 1983).

National Guard training is not "active service" for purposes of the receipt of workers' compensation benefits. A member of the National Guard may not be considered to be on "active service" and hence qualified for workers' compensation benefits unless he or she has been ordered by the governor to provide full-time service in response to an emergency confronting the state. Sullivan v. Indus. Claim Appeals Office, 22 P.3d 535 (Colo. App. 2000).

V. PRIVATE EMPLOYEES.

A. In General.

Attorney regularly employed by a corporation is an "employee". An attorney at law who is employed by a corporation regularly, and whose time and services are subject to the call of the employer under the terms of the employment, is an "employee" as that word is used in this section. Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934).

For in none of the provisions of the act is there language which expressly excludes members of the professions, attorney or other, if otherwise within the statute, from the enjoyment of its protecting purpose. Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934).

Workmen's compensation acts are being extended even to employees of charitable institutions. Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).

Student paid by university for particular service is employee subject to act. Where a stipulated monthly amount is paid by a university for a particular service rendered by one who is also a student, it cannot be said that the university is merely "assisting" the student to obtain an education, and that the student, if injured in the course of his employment, cannot have the benefits of the compensation law. Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).

Student employee status in job training program. To be an "employee" of the school district one must, at the time of injury, be receiving training under a work or job training program sponsored by the school district and one must have been placed by the school district with an employer for the purpose of training or learning trades or occupations. Further, the trainee is deemed an "employee" only "while so engaged" in such programs. Denver Pub. Sch. v. De Avila, 190 Colo. 184, 544 P.2d 627 (1976).

A critical requirement of the statute is that in order for the claimant to become an "employee" it was necessary that she be "placed" with the hospital for the purpose of training. The evidence discloses that at the time of her injury the claimant was not so "placed" where it is explicit that at the time of her injury the claimant was attending classes conducted exclusively by instructors employed by the school district. Under such circumstances, claimant does not come within the definition of "employee" and the school district is not liable for the injury sustained as the result of her mishap. Denver Pub. Sch. v. De Avila, 190 Colo. 184, 544 P.2d 627 (1976).

Discharged employee is thereafter a mere volunteer not subject to the act. The employee having been discharged, he was a mere volunteer, wrongfully engaged in driving the car of his former employer at the time of the accident; neither the doctrine of ratification nor estoppel had the slightest application to the case, even though the employer subsequently received the regular fare for the trip from the claimants, and upon no possible theory could the claimants recover compensation at the hands of the employer. Burke v. Indus. Comm'n, 70 Colo. 394, 201 P. 891 (1921).

B. Casual Employment.

Law reviews. For comment on Heckman v. Warren appearing below, see 24 Rocky Mt. L. Rev. 396 (1952).

For subsection (1)(b) exclusion to apply, casualness and course of business must exist. Brogger v. Kezer, 626 P.2d 700 (Colo. App. 1980).

Exclusion inapplicable where home deemed necessary facet of business. The maintenance of a home which serves as a company office and is used for entertaining customers is a necessary facet of the employer's business, and, thus, the exclusion of subsection (1)(b) is not applicable. Brogger v. Kezer, 626 P.2d 700 (Colo. App. 1980).

Casual is an antonym of regular. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

Casual employment is that which is occasional, incidental, temporary, emergent or haphazard. An employment, therefore, is casual within the meaning and intent of the workmen's compensation act when it is not regular, periodic or certain in nature. Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

But the fact that the employment is casual is not enough to exclude an employee from the count in determining whether employer had four employees. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Hoshiko v. Indus. Comm'n, 83 Colo. 556, 226 P. 1114 (1928); Comerford v. Carr, 86 Colo. 590, 284 P. 121 (1930); Kamp v. Disney, 110 Colo. 518, 135 P.2d 1019 (1943); Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951); Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

For the employment must also not be in the usual course of trade, business, or occupation of employer. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Hoshiko v. Indus. Comm'n, 83 Colo. 556, 266 P. 1114

(1928); Comerford v. Carr, 86 Colo. 590, 284 P. 121 (1930); Kamp v. Disney, 110 Colo. 518 135 P.2d 1019 (1943); Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951); Denver Truck Exch. v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

And one is employed in the usual course of trade, business, profession or occupation of his employer when he is engaged in work of the kind required in the business of the employer, and such work is in conformity with the established scheme or system of the business. If it is work of the kind required in the employer's business and in conformity with his established scheme or system of doing business, then it is in the usual course thereof. The term "usual course of business" has reference to the normal operations constituting the regular business of the employer. Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

Thus the workmen's compensation act is inapplicable if, at the time of an employee's injuries, his employment was casual "and not in the usual course of trade, business, profession or occupation of his employer". Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

But the fact that the servant is not employed for any specified time does not render his employment casual. Indus. Comm'n v. Funk, 68 Colo. 467, 191 P. 125 (1920).

So that casual employment in usual course of employer's business is sufficient. Even where the employment is casual, if at the time of the accident the employee was engaged in the usual course of the employer's business, he still is an employee within the terms of this title. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Hoshiko v. Indus. Comm'n, 83 Colo. 556, 226 P. 1114 (1928); Royal Indem. Co. v. Indus. Comm'n, 105 Colo. 25, 94 P.2d 697 (1927).

Employment not casual. Claimant who was employed on an hourly basis to perform part of the work of constructing a small office building on a used car lot was not a casual employee of the operator of the lot, and his employment was in the usual course of the operator's business. Neely-Towner Motor Co. v. Indus. Comm'n, 123 Colo. 472, 230 P.2d 993 (1951).

"Usual course of trade or business" does not apply to a single act of building by a farmer in a neighboring town. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926).

Emergency employee not active in usual course of business. Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

An attorney at law regularly employed by a corporation is not a casual employee and his employment is in the usual course of a company's business. Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934).