WORKMEN'S COMPENSATION—EMPLOYEE OR INDEPENDENT CONTRACTOR—THE RIGHT TO CONTROL AND THE REQUIREMENT OF PAYMENT OF WAGES

In *Golosh v. Cherokee Cab Co.*,[1] the Supreme Court of Georgia held that although the mode of receiving earnings is an indicator of the employee status that is required to receive a workmen's compensation award, the right to control the time, manner and method of executing the work is the crucial test.

The claimant was injured while employed as a cab driver for the defendant. He drove company owned cars and received calls to pick up passengers through the company dispatcher. The company had the right to control the time, manner and method of executing the work. The plaintiff was told when to come to work, how long to work and when to stop. If he refused to obey the company's instructions as to the working hours, the employer could discharge him or refuse to let him drive a car thereafter. At the completion of the working day the driver and the company divided the earnings equally after deducting operating expenses. The claimant was not on the company payroll for any purposes. The company claimed that the relationship of the parties was a partnership, or a joint enterprise, and that the plaintiff was not an employee within the meaning of the Workmen's Compensation Act.[2]

The supreme court affirmed the finding of the superior court that a workmen's compensation award was due and reversed the court of appeals.[3] The superior court had affirmed the award of the State Board of Workmen's Compensation that the taxicab driver was an employee[4] under the Workmen's Compensation Act, rather than an independent contractor.[5] The board allowed compensation to the claimant for his injuries arising out of and in the course of his employment. The court of appeals reversed the superior court basing its decision on *Atlantic*

1. 226 Ga. 636, 176 S.E.2d 925 (1970).

2. GA. CODE ANN. tit. 114 (Rev. 1956).

3. Cherokee Cab Co. v. Golash, 121 Ga. App. 277, 173 S.E.2d 747 (1970).

4. "'Employee' shall include every person in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer. . ." GA. CODE ANN. § 114-101 (Rev. 1956).

5. "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right of control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2(3) (1957).

Company v. Moseley,[6] where the manner in which the claimant was compensated[7] was controlling. In *Golosh*, the supreme court applied the test of the right to control[8] in determining that the taxicab driver was an employee deserving of workmen's compensation. The court stated that "[t]he test to be applied in determining whether the relationship of the parties under a contract for the performance of labor is that of employer and servant, or employer and independent contractor, lies in whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract."[9] The court further supported its findings that the cab company had the right to control by emphasizing that the power of termination of employment is sufficient evidence to a finding of the right to control.[10] In defining its position on the method of payment the supreme court held that although it may be an indicator of the nature of the relationship between the parties, it is not the decisive factor to be considered.[11]

The supreme court stated that the facts of *Atlantic* were clearly distinguishable from those in *Golosh*, and nothing in *Atlantic* required the decision rendered by the court of appeals in *Golosh*. Factually, in *Atlantic*, the claimant was a salaried employee for fifteen years up to and including July 1956.[12] Between July and October of the same year, the company proceeded to change his status from an employee ice deliverer to a semi-peddler by furnishing him a truck and paying him a commission during this period, and a salary from late August to the middle of October. Beginning October 18, 1956, the claimant alledgedly became a peddler.[13] He purchased the truck, received no "wages" and purchased the ice for resale, keeping the profits, which were the

6. 215 Ga. 530, 111 S.E.2d 239 (1959).

7. The court used "compensated" to designate earnings; therefore, care must be used to distinguish between compensation in regards to earnings and workmen's compensation.

8. "A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." RESTATEMENT (SECOND) OF AGENCY § 2(2) (1957). The word employee seems to be interchangeable with servant in the common law meaning. *See* REST. *supra* at § 2 comment d.

9. Fidelity & Casualty Co. of New York v. Windham, 209 Ga. 592, 593, 74 S.E.2d 835, 837 (1953). For a discussion of this taxicab case *see* Feild, *Workmen's Compensation, Annual Survey of Georgia Law*, 5 MERCER L. REV. 186, 200 (1953).

10. *See* Mitchem v. Shearman Concrete Pipe Co., 45 Ga. App. 809, 165 S.E. 889 (1932).

11. Swift & Co. v. Alston, 48 Ga. App. 649, 173 S.E. 741 (1934).

12. The quoted findings of fact by the Workmen's Compensation Board are quoted in *Atlantic Co. v. Moseley*, 215 Ga. 530, 111 S.E.2d 239 (1959).

13. The court in this case considers a worker who is classified as a peddler an independent contractor.

difference between the buying and resale of the ice. However, the workmen's compensation board's findings of fact states that this change from employee to peddler was a front[14] as ". . . this arrangement under which employees of the Atlantic Company are made 'peddlers' of ice is nothing more than a strategem devised for the purpose of evading liability under the Workmen's Compensation Act."[15] The board found that the manner of receiving, ordering and delivering the ice was the same, and upon the death of the claimant, the employer picked up the truck, reused it, and then re-sold it without formally foreclosing the title retention contract. The board computed the claimant's average weekly wage based upon his profit rate on the re-sale of the ice and the money paid for services.[16] Based upon these facts the workmen's compensation board found the claimant deserving of an award.

In *Atlantic*, however, the court classified the claimant as a peddler and stated that the amounts found by the board, although called average weekly wages, do not fall within the definition of wages required to classify a worker as an employee and bring him under the Workmen's Compensation Act. Stating that past decisions hold payment of wages are necessary to bring one within the benefit of the Workmen's Compensation Act,[17] the supreme court held that the claimant was not eligible for an award. They also held that although the findings of fact by the workmen's compensation board are not subject to review if supported by any competent evidence, "[t]he Workmen's Compensation Law does not rest in the board, or any director thereof, authority to classify the earnings of a peddler as wages so as to extend liability or coverage under the law."[18]

A Georgia authority in this area made a critical analysis of the *Atlantic* holding,[19] finding that the court was moving toward an undesirable view. Noting that there was danger in this view of defining wages in a restrictive manner, he felt that commissions, pay for piece

14. Material on the deliberate avoidance of the employment relation requirement under the Workmen's Compensation Act is located in 1A LARSON, WORKMEN'S COMPENSATION LAW § 46 (1967).

15. 215 Ga. at 531, 111 S.E.2d at 241.

16. For a comment on wages in the employment relationship and on *Atlantic see* Feild, *Workmen's Compensation, Annual Survey of Georgia Law*, 12 MERCER L. REV. 209, 212 (1960). *See* GA. CODE ANN. § 114-402 (Rev. 1956) for the basis for computing compensation.

17. *See* Fidelity & Casualty Co. of New York v. Windham, 209 Ga. 592, 74 S.E.2d 835 (1953); West End Cab Co., Inc. v. Stoval, 98 Ga. App. 724, 106 S.E.2d 810 (1958); Georgia Railway & Power Co. v. Middlebrooks, 34 Ga. App. 156, 128 S.E. 777 (1925).

18. 215 Ga. at 533, 111 S.E.2d at 242. *See* GA. CODE ANN. § 114-710 (Supp. 1970) for the grounds for setting aside a determination of the board.

19. Feild, *Workmen's Compensation, Annual Survey of Georgia Law*, 12 MERCER L. REV. 209 (1960).

work, employee profits and the receipt of bonuses should be classified as wages. In viewing that there have been many employees in the past who have been classified without question under the act, a restrictive classification of employee status such as the *Atlantic* decision would establish would exclude those employees from the benefits of the act. He concluded that "[p]roperly, the definition of wages should be synonymous with earnings, and if the other requirements of the act are met, the form and manner of payment of such earnings, or whether in kind or currency should make no difference."[20]

From an analysis of these two cases, therefore, it appears that the court of appeals in *Golosh* was attempting to follow what it believed was the guidance of the supreme court in *Atlantic*, which was a restrictive view of what type of compensation compose wages. This move of the court of appeals in *Golosh* indicated continuance toward the seemingly new view, started with *Atlantic* that the courts were going to analyze with scrutiny the earnings claimant derived from the work relationship. In many cases previous to the decision in *Atlantic* the fact that the employee was engaged in piecework or paid on the basis of commissions was not used as a factor in determining whether the relationship of employee and employer existed. This included cases where there was hauling and cutting of lumber on a piecework basis[21] and where the employee was paid only by commissions.[22] There were other cases prior to *Atlantic* where the requirement of wages was noted as necessary to bring the employee under the act, but these decisions involved factual situations where nothing was received from the employer and the employee generally rented the cab and kept the entire fares.[23] However, in *Atlantic*, even though the workmen's compensation board found the claimant to be an employee and computed what they called the average weekly wage, the court repudiated this finding without clear indication of why the claimant was not an employee and the board's findings were not "wages".[24] In *Golosh*, the court of appeals, feeling bound by this decision also disregarded the findings of the board even though they felt

20. *Id.* at 214.

21. Lokey & Simpson v. Hightower, 57 Ga. App. 577, 196 S.E. 210 (1938); Liberty Lumber Co. v. Silas, 49 Ga. App. 262, 175 S.E. 265 (1934); Love Lumber Co. v. Thigpen, 42 Ga. App. 83, 155 S.E. 77 (1930).

22. Fitts v. Zurich General Accident & Liability-Insurance Co., 57 Ga. App. 201, 195 S.E. 293 (1938); Joiner v. Sinclair Refining Co., 48 Ga. App. 365, 172 S.E. 754 (1934); Roberts v. United States Fidelity & Guaranty Co., 42 Ga. App. 668, 157 S.E. 537 (1930).

23. Fidelity & Casualty Co. v. Windham, 209 Ga. 592, 74 S.E.2d 835 (1953); West End Cab Co. v. Stovall, 98 Ga. App. 724, 106 S.E.2d 810 (1958).

24. "Clearly such amounts, if made by the deceased, do not fall within the term 'average weekly wages' under the Workmen's Compensation Law." 215 Ga. at 533, 111 S.E.2d at 242.

that the board was the best determiner of the conditions in a given situation.[25]

This situation required the supreme court to decide whether certain "employees" previously covered under the Workmen's Compensation Act would now be excluded due to a strict interpretation of wages. The supreme court, not wanting to impede the beneficial aspects of the act,[26] reversed the court of appeals using the prominent agency test of control. Disregarding the test of compensation used in *Atlantic* they turned the view of the courts back toward a reliance on the agency definition of the employer and employee relationship. Although cases interpreting the Workmen's Compensation Act require payment of wages to bring an employee under the act, the supreme court indicates that a definition of what constitutes wages must not be the controlling factor in finding a man an employee.

The court therefore has reemphasized the workmen's compensation board's role as the finder of fact, laid stress on the test of control and lessened the *Atlantic* emphasis on wages. As to future decisions in this area, an air of uncertainty exists. The supreme court distinguished *Golosh* from *Atlantic*. However, the court held that even if they were not distinguishable, *Atlantic* is not a full bench decision and need not be followed by the court. This position by the court while tending to disregard *Atlantic* leaves it "good" law. Although the supreme court states that the board's findings of fact are final and not subject to review if based on any evidence, there is a question of what influence *Atlantic*, which was not overruled, will have in the future. Hopefully the outcome of future cases will be decisions that will effectuate the beneficial purposes and policies of the Workmen's Compensation Act. This could be accomplished by viewing the economic reality of specific situations and not basing the determination of employee status merely on the test of whether earnings are wages.

JAMES F. GRAVELLE

25. *See Cole v. Peachtree Cab Co.*, 121 Ga. App. 177, 178, 173 S.E.2d 278, 279 (1970) where the court was faced with the same choice and stated that "[i]n our opinion the determination here should be left to the board and we would affirm its findings under the 'any evidence' rule; however, we are bound by the decision of the Supreme Court."

26. *See* 1 LARSON, WORKMEN'S COMPENSATION LAW § 1.00-5.30 (1964), for purpose and development of workmen's compensation.

The LAW REVIEW expresses its sincere appreciation to WEST PUBLISHING COMPANY for furnishing advance sheets used in preparation of the Georgia Law Survey and Fifth Circuit Survey. The LAW REVIEW also expresses its appreciation to the HARRISON COMPANY for furnishing advance sheets of the Georgia Supreme Court and Georgia Court of Appeals which will be utilized in preparation of future issues of the Georgia Law Survey. The LAW REVIEW also expresses its appreciation to the Clerk, United States Court of Appeals for the Fifth Circuit for furnishing advance sheets of that court's decisions which will be utilized in the preparation of the Fifth Circuit Survey.

- -

The MERCER LAW REVIEW is edited and published by students of the Walter F. George School of Law four times a year, in November, January, April and June. Each annual publication includes three issues plus an index or index supplement. Editorial Offices: Walter F. George School of Law, Mercer University, 1400 Coleman Avenue, Macon, Georgia 31207.

Subscription Price: Annual: $6.50

Single Issues:	Georgia Law Survey:	$2.50
	Lead Articles Issue:	$2.00
	Fifth Circuit Survey:	$2.00
	Index or Supplement:	$1.00

Second-class postage paid at Macon, Georgia 31208 and at additional mailing offices.