

Unique Workers' Compensation Aspects of Independent Contractors and Traveling Employees

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While the decision of whether or not to pay a workers' compensation claim is multi-factored, high on the list of elements is whether the injured worker was in the course and scope of employment. And as black and white an issue as that might seem to be, it is not always so cut and dry. There will be times a worker is designated an "independent contractor" and thus ineligible for workers' compensation benefits. But, the worker may claim that despite the classification, he or she was in fact an "employee" and thus entitled to workers' compensation benefits. Alternatively, there is the ever-thorny issue of whether a worker that sustained an injury outside of the workplace was considered a "traveling employee" which would likely make any claim for benefits for the injury compensable.

I. MASTER SERVANT

- Definition: The master-servant relationship only arises when the tasks are performed by the servant under the direction and control of the master and are subject to the master's knowledge and consent.
- Master-Servant relationship is the foundation of the Employer-Employee relationship and a longstanding principle of state workers' compensation laws.
- Unlike an independent contractor the independent contractor is an individual entering into an agreement to perform a job through the exercise of his or her own methods and is not subject to the control of the individual by whom he or she was hired.
- Keywords relative to Master-Servant and Independent Contractor – direction and control. Two words that courts focus on in deciding whether a master-servant (employer-employee relationship) exists.
- An Employer-Employee relationship is paramount in determining whether an injury is compensable because if the injury was sustained outside that relationship, the injury is not compensable.
- Conventional examples of Master-Servant work:

Standard –

Industrial model – full-time work, traditional 9-5, industrial and service sectors, indefinite period of time.

Craft model – skilled tradespersons, hired out of union halls by select employers, typically for finite periods.

II. INDEPENDENT CONTRACTORS

- An independent contractor is not entitled to benefits because of the absence of a master/servant relationship.
- There is not a hard and fast rule for determining whether any given relationship is one of an independent contractor or that of an employee/employer.
- Although each case must be determined on its own facts, courts have typically looked at certain factors as guidelines in determining an independent contractor.
 - Guidelines are:
 - Control of the manner in which the work is to be done.
 - Responsibility for the result only.
 - Terms of the agreement between the parties.
 - Nature of the work or occupation.
 - Skill required for performance.
 - Whether one employee is engaged in a distinct occupation or business.
 - Which party supplies tools.
 - Whether payment is by time or by job.
 - Whether work is for the regular business of the alleged employer.
 - Whether the alleged employer has a right to terminate employment at any time.
 - Whether one or all of these factors exist in any given situation is not controlling.
- The primary factor/key element: Whether the defendant has the right to control the work to be done and the manner it is performed. It is the existence of the right to control that is significant, irrespective of whether the control is actually exercised. Look at the extent to which there is actual supervision exercised by the alleged employer over the means and manner of the work performed.
 - Generally, these cases involve skilled individuals, i.e. carpenters, truck drivers, skilled professionals.
- Areas of Inquiry:

- No specific hiring practice i.e., signing documents, identifying claimant as an employee in an employment application, mandatory physical exam, drug testing, orientation program.
- Set own hours.
- Come and go on own discretion.
- Control days and hours worked.
- No vacation or sick pay.
- No sickness and accident benefits.
- Negotiation for pay.
- Pay per job.
- W-2 verses 1099.
- No deduction for Social Security, Federal income, and State taxes.
- No unemployment.
- Filed own income taxes federal and State.
- No requirement to report to alleged employer before or after the job goes directly to the job.
- No call in every day.
- Utilization of own tools.
- Does employee have to submit equipment/tools for inspection to be approved by alleged employer?
- No group plan benefits.
- No car insurance.
- No ID card.
- Skilled worker.
- Not told how to do job, rather destination.
- Pick and choose own materials for job.
- No bonus.
- No training by alleged employer.
- No business card with alleged employer's name.
- No uniform with alleged employer name.
- Work for others during time.
- Existence of a contract, written agreement nature and language contained therein, lease agreements identifying independent contractor versus employee.
- Documents filed at doctor's office, i.e. self-employment.
- Alleged employer only concerned over results and did not control the work or the Claimant's performance.
- Alleged employer accepts or rejects a substitute person.
- Alleged employer terminate for any reason.
- Restrictions on job performance or tools by alleged employer
- Requirement for mandatory logbooks per alleged employer
- Credit cards provided by employer for materials

- Alleged employer keeps personnel file and recordkeeping pertaining to the injured worker.

III. TRAVELING EMPLOYEE

- Traveling Employee – workers who travel away from the workplace on business even if the travel is local and of limited duration.
- Unique feature – no fixed place of work. Not stationary.
- Examples – traveling salesperson. Cable technician provided with a vehicle by employer.
- Presumption – generally considered to be continuously in the course and scope of employment while traveling.
- Traveling employee need not be actually working at the time of injury for an injury to be compensable.
- Exception – distinct departure or a personal errand. Abandonment.
- Interesting example of claim found compensable – Attendance at conference. Injury while playing basketball at gym 15 miles from the conference site.
- Interesting example of claim found compensable - Long haul truck driver passing time during layover drinking at a local bar and injured in bar fight.
- Interesting example of claim found not compensable – Uniform sales rep drives past his home after last sales call, attends happy hour with co-workers at a Tilted Kilt and gets into motor vehicle accident on way home. Left work vicinity, passed his home, homeward trip ended before he traveled to the Tilted Kilt. Dissent - Event was attended immediately after last appointment, employer paid for appetizers and drinks, company held similar events in other locations.

IV. GIG WORKERS AND EMPLOYMENT IN THE TECH AGE

- A gig economy is a labor market wherein temporary or flexible jobs are used with companies that tend to hire independent contractors and freelancers instead of full-time employees.
- The individual workers' are not on payroll. Payments are made without deducting any taxes or paying employer taxes.
- There is a wide variety of positions that fall into the gig category. The work can range from driving for Lyft/Uber, delivering food, walking dogs, or freelance articles.
- Estimates show that more than a third of the working population has or is working in some gig capacity with the expectation that this number will rise.
- Most of these companies' Terms of Service classify the workers as independent contractors and tailor themselves as a technological platform to connect the workers with clients. Most of the companies deny that they are in the transportation, delivery, or home repair businesses, instead, they argue the companies are platforms to connect willing passengers/clients with willing independent drivers, walkers, craftsmen, etc.
- Much like independent contractors, the gig work makes up the workers' yearly income. Each gig is a small portion of the total income.

V. CONCLUSION

- Traveling employees and independent contractors have unique features that are not conventional to the traditional master-servant/employer-employee relationship.
- Court cases that address the issue of compensability regarding independent contractors primarily focus on not just control but the right to exercise control.
- Court cases that address the issue of compensability regarding traveling employees focus on whether the injured worker abandoned employment (distinct departure).



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