

Under Advisement

regular workers' compensation legal updates for LWCC policyholders

The cover story of this issue of Under Advisement discusses the definition of an independent contractor and whether such workers are covered by the state Workers' Compensation Act.

The federal workers' compensation feature on page 3 discusses the special relief fund, which reduces workers' compensation liability for employers who hire workers with pre-existing conditions

We also continue our spotlight on an LWCC attorney so you can get to know the people who represent your legal interests as they pertain to workers' compensation.



LWCC

Louisiana Workers'
Compensation Corporation
2237 S. Acadian Thruway
Baton Rouge, LA 70808
(225) 924-7788
www.lwcc.com

Independent Contractors

Does Classifying an Employee as an Independent Contractor Absolve You of Workers' Compensation Liability?



While it is true that independent contractors are not covered under state workers' compensation, Louisiana law sets up specific criteria for what qualifies as an "independent contractor."

Some employers mistakenly believe that they can avoid workers' compensation exposure simply by classifying their employees as "independent contractors." However, this is not the case.

La. R.S. 23:1021 defines an independent contractor as any person who renders a service, other than manual labor, for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished. Independent contractors who meet this definition are not covered by the Workers' Compensation Act.

Manual Labor

In order to determine whether an independent contractor is excluded from coverage, you must first determine whether a substantial part of his work time is spent performing manual labor. The courts have defined "manual labor" liberally, looking at the hands-on feature of labor combined with the strenuous quality of the work to determine whether a task is manual or not.

If a substantial part of an independent

contractor's work time is spent in manual labor, your inquiry is over, and the worker will be covered by the provisions of the Workers' Compensation Act.

Independent Work

If a substantial part of the independent contractor's work time is not spent in manual labor, you must still be able to demonstrate the independent nature of his services as required by state law.

The following considerations are helpful in determining whether a worker qualifies as an independent contractor.



1. The fact that the principal supervises or retains control over the method of the work performed, as opposed to an interest only in the finished product, suggests that a worker is an employee and not an independent contractor.

2. The fact that the principal can terminate the worker's services at will

Continued on page 2

without a corresponding liability suggests that the worker is an employee and not an independent contractor.

3. Payment on an hourly basis suggests that the worker is an employee and not an independent contractor. Payment of a specified price for a specified result, on the other hand, suggests an independent contractor relationship.

4. The designation of a worker as an employee on the principal's payroll suggests the worker is an employee and not an independent contractor.

5. The fact that a worker has the right to hire his own helpers or assistants suggests he is an independent contractor. If the principal has control over whether the worker can re-

tain his own helpers or assistants, this suggests the worker may be an employee.

6. The fact that a principal provides material and equipment to perform the work suggests the worker is an employee and not an independent contractor.

7. The fact that the worker is an integral part of the principal's business suggests the worker is an employee and not an independent contractor.

8. The fact that a worker performs work exclusively for a principal over an extended period of time suggests the worker is an employee and not an independent contractor.

In considering whether one of your workers is an employee or an independent contractor, always remember that there is no black and white rule. The factors listed above are all possible considerations, none of which are necessarily determinative on their own. The courts ultimately will determine whether a worker qualifies as an independent contractor on a case-by-case basis.

You should also keep in mind that if a worker is excluded from workers' compensation coverage as an independent contractor, you may face tort exposure if the worker is injured due to your company's negligence.

In the Spotlight:

J. Michael Stiltner, LWCC Senior Attorney



J. Michael Stiltner
LWCC Senior Attorney

In his early college years, Mike Stiltner knew he would go to law school. Even though he had no particular area of practice in mind, he made his way to a casualty defense firm in Lafayette and has practiced defense ever since.

He started at LWCC as a staff attorney in 1993, and was soon making strides toward partner.

As a partner in Johnson, Stiltner & Rahman, LWCC's in-house counsel, Mike heads up the state workers' compensation defense section while also supervising the state attorneys and reviewing every

Office of Workers' Compensation file that comes to the department.

"The most challenging characteristic of my supervisory status is that it's a balancing act. My job is making sure things are done as required, while at the same time allowing the attorneys to develop their own style of practicing law," he says.

Mike also has learned to switch gears to operate from a business standpoint. He is involved with internal department issues such as working with claims to develop checklists to reduce litigation. Perhaps most importantly, Mike deals with the occasional unexpected problems that pop up and keeps the legal department running smoothly.

So what does Mike do when he's not enjoying the view from his seventh floor office? As a father of three boys and an enthusiastic sports fan, Mike enjoys coaching his kids' basketball and t-ball teams. A long-time fan of the Saints, he was there to see Archie Manning's first game with the Saints – and of course, remembers the play that won the game. He also enjoys traveling with his family and hopes to visit Greece one day.

EMPLOYEE MEDICAL HISTORY QUESTIONNAIRE

LWCC has a brochure with more information relating to the "Second Injury Fund" (see related article on page 3).

To receive a copy of this brochure, which includes a sample Employee Medical History Questionnaire, send an email to anolan@lwcc.com.

Longshore Special Relief Fund

Employers may be eligible for benefit reimbursement when hiring workers with pre-existing injuries



Longshore employers who hire workers with pre-existing physical impairments have an incentive through 33 U.S.C. 908(f). This special fund reimburses USL&H employers for benefits paid on permanent total and permanent partial disability.

In cases where the employer can prove entitlement to 8(f) relief, the employer's amount of recovery will vary depending on whether or not the subsequent injury is a scheduled injury or a non-scheduled injury.

Scheduled Injury. If the employment injury is a scheduled injury, the employer is liable for the greater of 104 weeks or the number of weeks due for the subsequent injury.

Non-Scheduled Injury. If it is a non-scheduled injury, the employer's liability is limited to 104 weeks. For hearing loss, the employer's liability is limited to the lesser of 104 weeks or the number of weeks attributable to the injury.

5 Conditions of Eligibility

An employer can prove entitlement to special fund relief by showing the following.

- (1) a new injury or aggravation
- (2) a pre-existing permanent partial disability
- (3) the pre-existing disability was manifest to the employer
- (4) the current disability is not due solely to the new injury
- (5) [for permanent partial disability] the disability must be materially and substantially greater than that which would have resulted from the new injury alone.

1. New Injury or Aggravation

An employer is not liable for compensation benefits unless the claimant sustains an injury in the course and scope of his employment. Therefore, if the employee does not sustain an injury, the employer is not liable for compensation benefits, and the special fund wouldn't come into play. If the claimant's current disability is due to the natural progression of the pre-existing condition, or is its natural consequence, the employer cannot be held liable.

2. Pre-Existing Permanent Partial Disability

A definition given for an existing permanent partial disability, also called the cautious employer test, reads as follows:

"[S]uch a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability."*

A serious physical disability is more than the existence of a prior injury. If the prior injury does not result in a serious, lasting physical problem, there probably won't be a finding of a pre-existing permanent disability. The following conditions have been found to meet the definition of a pre-existing disability (citations omitted):

- Degenerative disc disease
- Alcoholism
- Arthritic Conditions
- Back injuries
- Diabetes
- Hypertension
- Heart Disease
- Interstitial Fibrosis
- Mental Retardation and/or learning disabilities

- Psychiatric disorders
- Respiratory diseases
- Thrombophlebitis

3. Employer Knowledge of Pre-Existing Disability

This is not a requirement provided by statute, but has been added by the courts.

—————***Continued on page 4***

**Glover v. C & P Tel. Co.*, 564 F.2d 503 (D.C. Cir. 1977)

Under Advisement

Under Advisement is published regularly by Louisiana Workers' Compensation Corporation's in house law firm, made up of attorneys experienced in workers compensation, third-party liability and maritime law.

The articles contained in this publication are intended for the general information of our readers. LWCC is not engaged in rendering legal advice, and our readers should not use this publication as a substitute for such services in specific situations.

President & CEO
Stephen W. Cavanaugh, JD
Chief Operating Officer
Kristin W. Wall, JD
Director of Litigation Services
Paul D. Buffone, JD
Editor
Ted Williams, JD
Contributing Authors
Travis Lebleu, JD
Lisa Murray, JD



2237 S. Acadian Thruway
Baton Rouge, LA 70808

RETURN SERVICE REQUESTED

STNDRD-PRST
U.S. Postage
PAID
Permit No. 1339
Baton Rouge, LA

Special Relief Fund Continued from page 3

To prove the employer knew of the pre-existing disability, the employer must show he had personal knowledge of the pre-existing disability or prove knowledge based on medical records in existence at the time of the subsequent injury from which the condition was objectively determinable. For the condition to be objectively determinable, there must be sufficient information that might motivate a cautious employer to consider terminating the employee because of the risk of compensation liability.

4. The Current Disability Must Not be Due Solely to the New Injury

The employer must show that the second injury by itself would not have led to the current total disability. The second injury must combine

with the previous disability to cause permanent and total disability. Special fund relief will be denied if there is no evidence showing that the previous disability contributed to the current total disability.

In the U.S. Fifth Circuit Court of Appeal, which governs Louisiana, an employer must prove that without the previous disability, the worker would not now be totally and permanently disabled.

5. (PPD Cases) The Disability Must be Materially and Substantially Greater than that Which Would Have Resulted from the Second Injury Alone

When submitting the application for reimbursement to the U.S. Department of Labor (DOL), the DOL prefers to see a medical report

where the medical provider uses the magical language, "materially and substantially." This requirement also can be shown by a disability rating before and after the second injury.

Lack of the magical language will not automatically cause a denial of the request for special fund relief, but it does require that the U.S. DOL do a further inquiry into the relationship between the previous disability and the second injury. The disability rating will help the U.S. DOL determine if the current disability is materially and substantially greater than that which would have resulted from the second injury alone.

The Special Fund is stingy with their money and will not approve an application for reimbursement unless the employer satisfies these requirements.