Navigating Workers' Compensation Claims in the Construction Industry

Alicia W. Birach

Foster Swift Collins & Smith PC

28411 Northwestern Highway, Suite 500

Southfield, MI 48034

(248)785-4721

abirach@fosterswift.com

What is workers' compensation?

- "Grand bargain"
  - The intent is that employers will quickly compensate injured workers for work related injuries, regardless of fault, and in return the amount a worker can recover is limited.
  - It is a no-fault system where the employee does not have to prove negligence on the part of the employer and **negligence on behalf of the employee is <u>not</u> a barrier to the receipt of benefits**.
  - Workers' compensation is an employee's exclusive remedy for a work-related injury absent an intentional tort.

What is workers' compensation?

- What benefits can an injured worker recover?
  - Limited wage loss benefits
  - The cost of **related** medical treatment
  - Vocational rehabilitation services

Is every business covered?

- Numerical test:
  - Employer regularly employs **three** or more employees at a time; **or**
  - Employer regularly employs one worker for thirty-five or more hours per week for thirteen or more of the preceding fifty-two weeks.
  - Employers that are not covered under the Act based on the numerical test can opt in by purchasing a valid workers' compensation policy.

Who is an employee?

- The definition of employee will vary by state and statute.
  - It is important to remember that the definition of an employee in one area of the law is not necessarily the same as it is in workers' compensation.
- Most states use a multifactor test to determine whether an employment relationship exists.
- If the alleged employer has the right to control and direct the individual performing the services not only as to the result but the means by which it is to be accomplished, it is more likely the individual performing the service will be considered an employee.
- Tax filings aren't necessarily dispositive; however, are given weight.

Who is an employee?

- Here in Michigan, we use a 20-factor test established by an IRS revenue ruling. MCL 418.161(1)(n) and Rev Rul 87-41
- What are the twenty factors?

1. Instructions
2. Training
3. Integration
4. Services rendered personally
5. Hiring, supervising, & paying assistants
6. Continuing relationship
7. Set hours of work
8. Full time required
9. Work on employer's premises
10. Order or sequence set
11. Oral or written reports
12. Payment by hour, week, or month
13. Payment of business or travel expenses
14. Furnishing of tools and materials
15. Significant investment
16. Realization of profit or loss
17. Working for more than one firm at a time
18. Making services available to the public
19. Right to discharge
20. Right to terminate

Who is an employee?

- Shoot-through liability
  - A general contractor will be considered the statutory employer of an **employee** of an uninsured subcontractor.
    - **Example:** A general contractor on a commercial construction site hires a subcontractor to perform drywall work on a project. The subcontractor does not have workers' compensation insurance. While working at the job site, an employee of the subcontractor is injured. The general contractor will be considered the statutory employer of the injured individual because the subcontractor did not have coverage.
  - General contractor can seek indemnity from the immediate employer.

Who is an employee?

- Labor brokers and Professional Employer Organizations
  - It is becoming increasingly common for companies to enter into agreements with labor brokers or professional employer organizations ("PEO").
  - In these situations, both the labor broker and PEO can be considered employers and given the benefit of the exclusive remedy provision.
  - In these situations, the terms of the contract between the two companies will dictate who is obligated to pay benefits in the event of a compensable injury.

Is the injury compensable?

- Did the injury arise out of **and** in the course of the employment?
  - The courts have determined that not every injury that occurs "in the course of" employment "arises out of the employment."
  - An injury must satisfy both elements to be deemed compensable.
- At what point is an injury considered to have occurred "in the course of" employment?

Is the injury compensable?

- Going to and coming from work
  - Typically, coverage starts when the worker is on the employer's premises and injuries that occur while commuting to or from work are not covered.
  - MCL 418.301(3) indicates, "[a]n employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in pursuit of an activity the major purpose of which is social or recreational is not covered under this act."

Is the injury compensable?

- Is an injury that occurs while commuting to or from work ever compensable?
  - There are exceptions to the general rule which are discussed by the court of appeals in *Bowman v RL Coolsaet Constr Co*. The exceptions include:
    - The employee is on a special mission for the employer;
    - The employer derives a special benefit from the employee's activity at the time of the injury;
    - The employer paid for or furnished employee transportation as part of the employment contract;
    - The travel comprised a dual-purpose combining employment related business needs with the personal activity of the employee;
    - The employment subjected the employee to excessive exposure to traffic risks; or
    - The travel took place as a result of split-shift working schedule or employment requiring a similar irregular non-fixed working schedule.
  - The appellate commission in *Smith v Chrysler Group* confirmed that meeting any of the foregoing exceptions brings the injury within the course of employment.

Is the injury compensable?

- Business travel
  - Business travel is generally considered compensable.
  - Injuries are often considered compensable even if it occurs during a deviation as long as the deviation is reasonable and tacitly permitted by the employer. *Thomas v Certified Refrigeration, Inc,* 392 Mich 250 (1945).
  - A reasonableness standard should be applied when evaluating whether a deviation was significant enough to remove the injury from the course and scope of the employment.

Injuries occurring in parking lots

- If an injury occurs in a parking lot owned, leased, or maintained by the employer, the injury is typically covered.
  - This includes driveways leading up to the parking lot owned by the employer.
  - Injuries which occur on property not owned, leased, or maintained by the employer are considered compensable **only if** the employee is traveling in a reasonably direct route between the parking area owned, leased, or maintained by the employer and the worksite. *Simkins v GMC*, 453 Mich 703 (1996).

Types of injury

- Personal Injury versus occupational disease
  - Typically, a personal injury results from a single event. However, a personal injury can be caused by repetitive trauma.
  - Occupational diseases are diseases or disability due to causes and conditions that are characteristic of and peculiar to the business of the employer and that arise out of the course of the employment.

Is contracting the Coronavirus a compensable injury?

- Here are some of the issues to consider:
  - Presumptions in your state
  - Occupational disease versus personal injury
    - Whether contraction of the Coronavirus will be considered an "ordinary disease of life" when dealing with an occupational disease claim.
    - MCL 418.401(2)(b) states in pertinent part that "[a]n ordinary disease of life to which the public is generally exposed outside of the employment is not compensable."
  - Whether an employee can establish by a preponderance of the evidence, that his/her actual contraction of the virus occurred during the "course of employment."
    - Proving an exposure is not sufficient.
    - This will likely be a heavy burden for employees who have also been exposed to COVID-19 at home, while at the grocery store, while retrieving the mail, while at the gas station, while at a physician's office, etc.
  - Whether an employee would be able to establish, by a preponderance of the evidence, that his/her contraction of the virus "arose out of" his/her employment.
    - Historically, some jurisdictions, including Michigan, have been inclined to incorporate an "increased risk" test to determine whether an injury or disease "arose out of" the employment relationship.

Third-party liability

- An injured employee can seek damages against a third party.
- If damages are recovered from a responsible third party by the injured employee, the employer or carrier is entitled to repayment or credit for the compensation benefits it paid.
- The employer or carrier must bear its proportionate share of the costs and fees in the third-party recovery.
- Example:
  - An employee is working on a construction site when a crane owned by a third-party malfunctions and drops a piece of steel on the employee's foot. If the employee sues and recovers against the manufacturer of the crane, the employer or carrier has a lien on the employee's recovery for benefits paid.

Mitigating risk and limiting liability

- Before the alleged injury:
  - Maintain the worksite
  - Implement safety measures
  - Employee training on best practices and how to use equipment
  - Clearly delineated and strictly enforced employee policies
  - Video cameras on site
  - Verify insurance of subcontractors and require periodic updated proof of coverage to ensure the policy is still valid

Mitigating risk and limiting liability

- After the alleged injury:
  - Have the employee complete an injury report
  - Take witness statements
  - Review and save any video footage
  - Conduct social media search
  - Report injury to carrier and ensure you are complying with state reporting/filing requirements
    - When reporting the injury to your carrier make sure to consider whether the current alleged issues are related to a new incident or a prior injury
  - Offer favored work
  - Think twice before terminating employment

Workers' compensation trends

- Trends in workers' compensation laws:
  - There has been a trend across the country over the last two decades to reduce costs associated with workers' compensation claims.
  - We amended the law here in Michigan in 2011. The changes were considered employer friendly and codified a significant amount of case law.
    - We are starting to see the pendulum swing in the other direction as courts strike down certain more restrictive provisions which violate the grand bargain so to speak.
    - In Michigan we recently amended our four rule sets making it less cost prohibitive for a plaintiff to proceed to trial and establishing strict requirements related to the information a defendant must provide an employee.

Workers' compensation trends

- Trends in annual filings and dispositions:
  - In Michigan in 2011 there were:
    - 14,388 contested claims pending at year end
    - 7,828 contested cases opened during the year
  - In Michigan in 2020 there were:
    - 8,743 contested cases pending at year end
    - 4,587 contested cases opened during that year
  - The number of lost time claims has remained consistent since 2011. There were 23,957 lost time claims in 2011 and 22,037 lost time claims in 2020.

Workers' compensation trends

- Trends in annual filings and dispositions:
  - Facilitation is the new trial
  - The number of opinions issued each year has decreased significantly from 248 in 2011 to 28 in 2020.
    - Some of the reduction in 2020 is attributable to COVID closures. However, only 58 opinions were issued in 2019.

Workers' compensation trends

- Cost of claims:
  - Total workers' compensation payouts have also declined since 2011. Workers' compensation payouts in 2011 totaled approximately $1,281,000,000. Workers' compensation payouts in 2020 totaled $781,418,000.
  - The average redemption amount has remained steady. The average redemption amount was $62,818.81 in 2011 and $59,235.42 in 2020.

Trends in premiums

- Who determines premiums?
  - The designated data collection organization in your state sets a manual rate for each job classification code.
  - The vast majority of states use the National Council on Compensation Insurance ("NCCI") as their data collection organization.
  - There are eleven independent data collection organization states including, Michigan, Indiana, Wisconsin, Pennsylvania, Minnesota, California, Delaware, Massachusetts, North Carolina, New Jersey, and New York.
    - The Compensation Advisory Organization of Michigan is the data collection organization used here in Michigan.
  - Ohio, North Dakota, Wyoming, and Washington are monopolistic states.

Trends in premiums

- NCCI has over 800 classification codes.
  - The manual rate for each classification code will vary by state because of the differences in laws and benefits.
- The manual rate is the specified rate established by the classification code for every $100.00 of payroll.
- The manual rate is multiplied by the employer's annual payroll to establish the manual premium.
  - Example: If the manual rate for a framer is $5.00 for every $100.00 of payroll and the employer has $100,000.00 in annual payroll the manual premium would be $5,000.00.
- The manual premium is then adjusted by other factors including experience modification to determine the annual premium.
- The basic premise of experience modification is actual loss versus expected loss.
  - It is important to understand that primary loss has a bigger impact on experience modification than excess loss.

Questions?

Alicia W. Birach
Foster Swift Collins & Smith PC
28411 Northwestern Highway, Suite 500
Southfield, MI 48034
(248)785-4721
abirach@fosterswift.com

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