MILLER CANFIELD

Worker's Comp Independent Contractor Criteria Reinterpreted by Michigan Court of Appeals

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A person must meet all three statutorily defined criteria for an independent contractor in order to avoid the exclusive remedy provision of the Michigan Worker's Disability Compensation Act (WDCA), a special panel of the Michigan Court of Appeals ruled on December 3, 2013.

In *Auto-Owners Insurance Co. v All Star Lawn Specialists Plus*, the Court ruled that a person who "[1] does not maintain a separate business, [2] does not hold himself or herself out to and render service to the public, and [3] is not an employer subject to [the WDCA]" is an employee, and must pursue any action related to a work injury through the worker's compensation system.

The decision overturns a 21-year old precedent set in *Amerisure Ins. Co. v Time Auto Transportation*, in which the Court of Appeals ruled that a person must meet only one of the three criteria to be considered an independent contractor.

This statutory interpretation will almost certainly result in fewer cases where individuals are found to be independent contractors rather than employees under the WDCA, and the WDCA will be the exclusive remedy for those employees who are injured at the worksite.

Section 161(1) of the WDCA sets forth the definition of an employee. Section (1)(n) defines an employee as "every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act." If an individual is considered an employee under the WDCA, the benefits set forth in the WDCA are their "exclusive remedy" for any workplace injury. If the individual is determined to be an independent contractor, they are prohibited from any recovery under the WDCA, but would, among other things, have the right to file a personal injury claim against the employer for any workplace accidents.

Under the 1992 *Amerisure* decision, a person was an independent contractor, and not an employee, if any of the three criteria in section 161(1)(n) applied.

But the special panel in Auto-Owners, overturned that ruling , finding that basic statutory construction required that the provision to be read by focusing on the word "and." Under this interpretation, an individual must meet all three requirements in order to be an independent contractor and not an employee. The Court reasoned that it would be a "dubious" result where a full-time secretary advertised to the public and performed some free-lance typing outside of his or her full-time employment, or where a full-time music teacher supplemented his or her income by providing music lessons on the side, were considered independent contractors and denied covered by the WDCA.