Workers' Compensation and the Use of Owner-Operators in Interstate Motor Carriage: A Need for Sensible Uniformity

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Workers' compensation was created by statute as a method and means of giving workpersons and their families greater protection and security against employment related injuries and death.

All fifty states have such statutes and, while constant as to objectives, they are so varied as to defy any meaningful general description.[1] At best, it can be said that they impose on industry the burden of care with respect to disabled employees, or their dependents in the case of death, where an accident occurs in the course of employment. The burden is imposed without the necessity of finding fault or negligence on the part of the employer.

The statutes are a 20th century development which evolved as the country industrialized and the number of industrial accidents and personal injury suits increased. The problems of proving an employer negligent and avoiding common law defenses such as contributory negligence, assumption of risk, and negligent acts of fellow servants created a situation where it became evident that existing legal processes were too costly and acted harshly on claims of injured employees.

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1. American Samoa, Guam, Puerto Rico and the U.S. Virgin Islands also have workers compensation laws. For a summary of such laws, see 1991 Analysis of Workers Compensation Law prepared and published by the U.S. Chamber of commerce. [Hereinafter "1991 Analysis"].

In essence, the statutes imposed liability without fault on the theory that the costs would be considered a necessary cost of production to be borne ultimately by the consumer who benefitted from the labor. The imposition of liability in this manner was considered a method of promoting the general welfare.

The statutes attempt to provide sure, prompt, and reasonable benefits to victims without burdening the court system and eliminating the costs and delay attendant thereto. Also, they encourage maximum employer interest in safety and rehabilitation through an experience-rating mechanism and thus promotes the frank study of causes of accidents as a means of reducing them.

While the statutes have accomplished many of the goals their sponsors sought, there are many problems with the system making the statutes expensive to administer and less equitable and less effective. Virtually all states have recently undergone major reform or attempts at such reform.[2]

The absence of a federal statute governing workers' compensation in interstate motor carrier operations leaves the motor carrier in a morass of confusion with workers' compensation statutes.[3]

DEFINING EMPLOYMENT

One of the more significant issues to motor carriers is what constitutes "employment." A large segment of the industry utilizes independent contractors or more commonly referred to as "owner-operators."

Owner-operators are individuals who own one or more tractors or tractor-trailer units and who lease such vehicles with driver services to motor carriers. Normally, leasing is done on a long term basis.

The relationship is governed by a written lease, the terms of which, in part, are governed by regulations promulgated by the Interstate Commerce Commission[4] and/or state regulatory agencies.[5]

While the requirements vary to some extent, the lease normally calls for the motor carrier lessee to:[6]

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2. Sparkman, *Workers' Comp. System Is At Risk*, Transport Topics, May 13, 1991, p. 21.

3. Federal workers' compensation laws do exist. Two such statutes are The Federal Employees Compensation Act, 5 U.S.C. § 751 *et. seq.*, which governs compensation of all federal government employees, and The Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et. seq.*, which provides job disability benefits for all U.S. maritime employment as well as others.

4. Lease and Interchange of Motor Vehicles, 49 C.F.R. § 1057 (1988) [Hereinafter ICC and/or ICC Regulations].

5. *See, for example*, Minnesota Rules § 7800.2600 (1989).

6. *See, for example*, ICC Regulations, 49 C.F.R. § 1057.12(c).

1. assume exclusive possession, control, and use of the equipment for the duration of the lease.
2. assume responsibility for the operation of the equipment.

The ICC Regulations have been characterized as a "truth in leasing" regulation and it is not atypical to see contracts which are ten to twenty pages in length since the Regulations also call for the contract to delineate the respective obligations of the lessor and lessee in areas such as taxes, road expenses, insurance requirements, and payment terms.

The contracts are normally drafted with the common law principles of an employer-employee relationship[7] in mind and contain clauses which indicate that the parties contemplate an independent contractor relationship and not one of employment.

However, courts and administrative agencies have consistently indicated that substance is more persuasive than form and attach minor importance to the written intent of the parties.[8]

The contract, in at least one instance, however, may have a significant bearing on the issue as to whether the owner-operator will be considered an employee for purposes of workers' compensation. Many courts and administrative agencies have adopted the position that the administrative requirements that a carrier-lessee have exclusive possession, control and use of the equipment and assume responsibility for its operation is *prima facie* evidence of control evidencing an employer-employee relationship.[9]

While the specific language on its face would tend to support such a position, an examination of the reasons for the ICC Regulations, the proceedings underlying their adoption, and related regulations leads to a contrary conclusion.

In reviewing the underlying reasons for the statutory provision and ICC Regulations, the ICC and courts have held that a carrier must control the service performance, but need only control the vehicle to the extent

7. For a general discussion of such principles, *see* United States v. Webb, 397 U.S. 179 (1969).

8. *See* Judy v. Tri-State Motor Transit Co., 844 F.2d 1496 (11th Cir. 1988); Yellow Cab Co. v. Industrial Comm'n., 124 Ill. App.3d 644, 464 N.E.2d 1079 (1984); Wenholdt v. Industrial Com., 95 Ill. 2d 76, 447 N.E.2d 404 (1983); and Justice v. Belford Trucking Company, Inc., 676 So. 2d 131, 134 (Fla. 1973). Professor Larson, in his treatise on workers' compensation law, argues that the label given by the parties to their status should be entitled to great respect if it can be accurately ascertained. 1C Larson's Workmen's Compensation Law, § 46.30 at 8-263 and 8-264 (1986). [Hereafter "Larson"]

9. White v. Excalibur Ins. Co., 599 F.2d 50 (5th Cir. 1979) *cert. den.*, 494 U.S. 965 (1979); Transport Motor Express, Inc. v. Smith, 262 Ind. 41, 311 N.E.2d 424 (1974), *supp. op* Transport Motor Express, Inc. v. Smith, 289 N.E.2d 737 (Ind.App. 1973); and Gackstetter v. Dart Transit Co., 269 Minn. 146, 130 N.W.2d. 326 (1964). *Contra*, Patterson v. Workmens' Compensation Appeal Bd. (Wayne W. Sell Corp.), 86 Pa. Commw. 608, 485 A.2d 886 (1985).

necessary to be responsible to the shipper, the public, and the ICC for the transportation

Historically, many operators were judgment proof and the public was not protected. The ICC Regulations were designed to enforce safety requirements and to fix financial responsibility for damages and injuries to shippers and members of the public.[10]

The above concept is consistent with common principles of tort law. An individual or a corporation carrying on activity which can lawfully be carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others or is obligated by statute or by administrative regulation to provide specified safeguards or precaution for the safety of others is subject to liability to third parties for harm caused by the failure of a contractor or the contractor's employer.[11]

The tort liability flows from the franchise and/or statutory/administrative duty and not because there cannot be an independent contractor relationship for other purposes.

The "loaned servant" doctrine[12] also lends support to the position that the ICC Regulations do not *per se* create an employer-employee relationship between a motor carrier and the operator of the vehicle it leases.

In *Occidental Fire & Casualty Co of North Carolina v. International Insurance Co.*,[13] a driver for a fleet owner was involved in an accident causing the death of the driver of the second vehicle. The carrier's insurer and the lessor-fleet owner's insurer litigated the issue as to which insurer was primarily liable for the settlement of the wrongful death claim.

The "loaned servant" issue became relevant as the court found that legal responsibility for the negligent action of the driver could only be attributed to the carrier if the driver was considered a loaned employee.[14]

The court specifically considered the ICC Regulations, but found the control and responsibility provisions did not establish that the carrier had complete control over the driver of the truck for the purpose of determining which party "[w]as the employer of the driver . . . ."[15]

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10. *See* Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U.S. 28 (1975); Travelers Ins. Co. v. Transport Ins. Co., 787 F.2d 1133, 1140 (7th Cir. 1986).

11. RESTATEMENT (SECOND) OF TORTS, §§ 424 and 428.

12. Under the "loaned servant" doctrine, a servant of one master may be loaned to another and become the servant of the second master rather than the first for the special purposes for which he is loaned. Richards v. Illinois Bell Telephone Co., 66 Ill. App.3d 825, 383 N.E.2d 1242 (1978). Under the doctrine, however, one does become a loaned employee unless he is completely free from the control of the first employer and wholly subject to the control of the second employer. *Id.* at 383 N.E.2d at 1249-1250. *See also* Daily Express, Inc. v. Workmen's Compensation Appeal Bd., 46 Pa. Commw. 434, 436-37, 406 A.2d 600, 601-02 (1979).

13. F.2d 983 (7th Cir. 1986).

14. *Id.* at 993.

15. *Id.* at 994.

The driver was found not to be a loaned employee as the evidence established he was not wholly free from the control of the fleet owner who hired, trained, and paid the driver.[16]

While the case involved a fleet owner using third party employees to drive as opposed to an owner-operator who drove the truck he leased, the principle involved is clearly applicable. An individual can be under the control of one party for certain purposes and still be in self-control, or in the control of a second party, for other purposes. The ICC Regulations did not really address the "employment" issue or preempt the issue so long as the public is financially protected.

AGENCY RECOGNITION OF INDEPENDENT CONTRACTORS

It is difficult to argue that the ICC Regulations abrogated the independent contractor relationship when the agency refers to that relationship in so many contexts, including the discussions underlying the leasing regulations themselves.[17]

In *Leasing and Interchange of Vehicles By Motor Carriers*,[18] the ICC noted that in the early years of regulation, the Bureau of Motor Carriers, on August 19, 1936, issued Administrative Policy No. 4,[19] which provided, in effect, that if the vehicle was not owned by the carrier, it could only be used if the vehicle was driven by one of its employees.

Thereafter, the Commission stated:

> Possibly subject to some qualifications, it may be stated that when a certificate or permit holder furnishes service in vehicles owned or operated by others, he need control the service, to the same extent as if he owned the vehicle, but need control the vehicle only to the extent necessary to be responsible to the shipper, the public, and the Commission for the transportation. If these tests are met, the vehicle operated in the holding out of service to the public could be provided by independent contractors. . .[20]

In the above case, the Examiner had recommended that persons assigned to drive should be employees of the carrier.[21] However, this requirement was not adopted by the Commission.[22]

Equally significant is that the United States Department of Transporta-

16. *Id.*at 994.

17. The use of owner-operators has also been recognized in rate making proceedings. *See* Womack *Cost of Service - The Owner Operator Dilemma, Tariff Rates and Practices - Motor Carrier of Property Part 1,* Papers and Proceedings, 1970; Transportation Law Institute (Bobbs Merrill Co., Indianapolis, 1972) p. 325.

18. Lease and Interchange of Vehicles By Motor Carriers, 51 M.C.C. 461 (1950).

19. *See* 2A Federal Carriers Reporter (C.C.H.) ¶ 25,004, Lease of Owner-operated Vehicle (1969).

20. 51 M.C.C. at 466.

21. 51 M.C.C. at 534.

22. Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675 (1951).

tion which has jurisdiction over the safety regulations governing interstate motor carriage also recognize the use of independent contractors by regulated motor carriers.

The term "employee," for example, is defined as follows in "Safety Regulations: General."[23]

> "*Employee*" means:
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> (a) a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle). . .

Similarly, in the DOT's drug testing regulations, it is stated:[24]

> "*Drivers subject to testing*" means:
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> employee drivers and contract drivers under contract for 90 days or more in any period of 365 days.

These types of references clearly indicate that the independent contractor status is recognized in motor carrier transportation by the federal government and that the Regulations dealing with the lease of vehicles with drivers do not create a *per se* employer-employee situation.

Despite the strong arguments that the ICC Regulations do not create an employer-employee relationship, the courts have split on the issue and motor carriers are faced with the prospect that the owner-operators they engage may or may not be employees depending on the jurisdiction in which a claim is filed.

JUDICIAL DECISIONS

The decision *Proctor v. Colonial Refrigerated Transportation, Inc.*,[25] is frequently cited as an example of a judicial decision in which the ICC Regulations were found to preclude an independent contractor relationship. In the case it is stated:[26]

> [T]he statute and regulating pattern clearly eliminates the independent contractor concept from such lease arrangements and cast upon [the authorized carrier] full responsibility for the negligence of [the contractor] as driver of the leased equipment.

While on the surface the above language tends to indicate that an independent contractor relationship could not exist, it should be noted that the court did not actually hold the contractor to be an employee of the carrier. In reality, it found that liability for personal injuries occurring in motor carrier operations could not be avoided by the carrier on the basis of an independent contractor concept.

In at least two instances, federal courts, however, have found drivers

23. 49 C.F.R. § 390.5.
24. 49 C.F.R. § 391.81.
25. 494 F.2d 89 (4th Cir. 1974).
26. *Id.* at 92.

to be federal statutory employees for the purposes of the workers' compensation statute.[27] In each instance, the court held that the amount of control contemplated under the ICC Regulations was tantamount to an employer-employee relationship.

In *Judy v. Tri State Motor Transit Co.*,[28] however, the court found that an employer-employee relationship was not created *per se* by ICC Regulations, but that state law would have to be examined. In *Bryant v. Refrigerated Transp. Co.*,[29] a state court reached the same conclusion stating that the ICC Regulations standing alone were insufficient to create an employer-employee relationship.[30]

STATE LAWS

If a court or administrative body gets beyond the ICC Regulations, it will look to state law to see if an employment situation is involved.

A recent survey of workers' compensation statutes indicated that twenty nine states and the District of Columbia exclude owner-operators through application of a common law definition of employees. Nine states have excluded independent contractors through specific statutory language and seven states have specifically exempted owner-operators. The remaining five states exclude independent contractors through the courts' interpretation of statutes.[31]

Minnesota is an example of a state that excludes independent contractors through the use of a common law definition.[32] Minnesota also treats owner-operators directly through administrative rules. Its Rules, in the eyes of many, are a model in recognizing the intricacies of the industry within the concepts of workers' compensation.

The rules in Minnesota regarding "truck owner-driver" are as follows:[33]

> *Subpart 1.* Definition. A truck owner-driver is any individual, partnership, or corporation (hereinafter referred to as "individual") who owns or holds a vehicle as defined in Subpart 2 under a bona fide lease and who leases that vehicle together with driver services to any entity which holds itself out to and does transport freight as a for-hire or private motor carrier.
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> *Subpart 2.* Independent Contractor. In the trucking industry, an owner-op-

27. *See* White v. Excalibur Ins. Co., 599 F.2d 50 (5th Cir. 1979), *cert. den.* 494 U.S. 965 (1979); and Heaton v. Home Transp. Co., 659 F.Supp. 27 (N.D.Ga. 1986).

28. 844 F.2d 1496 (11th Cir. 1988).

29. 418 So.2d 281, 284 (Fla.App. 1982).

30. *See also* Tretter v. Dart Transit Company, 271 Minn. 131, 135 N.W.2d 484 (1965). *Contra*, Sharp v. Bailey, 521 N.E.2d 368 (Ind.App. 1988).

31. Wicker, Survey of State Workers' Compensation Laws: The Treatment of Owner-Operators," a study sponsored by the American Trucking Associations, Inc. (July 20, 1989).

32. MINN. STAT. ANN. § 176.011(9). [Hereinafter "M.S.A."]

33. Independent Contractor, Minn. R. § 5224.0290 (1989).

erator of a vehicle that is leased and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulator agency is an independent contractor, not an employee, while performing services in the operation of his or her truck, if each of the following factors are substantially present.

a. The individual owns the equipment or holds it under a bona fide lease arrangement.
b. The individual is responsible for the maintenance of the equipment.
c. The individual bears the principal burden of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road.
d. The individual is responsible for supplying the necessary personal services to operate the equipment.
e. The individual's compensation is based on factors related to the work performed including a percentage of any schedule of rates or lawfully published tariff and not on the basis of hours or time expended.
f. The individual generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier, and specifications of the shipper.
g. The individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

Subpart 3. Employee. An owner-operator of a vehicle as defined in Subpart 2 is an employee, not an independent contractor, while performing services in the operation of the individual's truck, if all of the following criteria are substantially met:

a. The individual is paid compensation for his or her personal services:
   (1) Based solely on wage by the hour or a similar time unit that is not related to a specific job or freight movement;
   (2) on a premium basis for services performed in excess of a specified amount of time; and
   (3) from which FICA and income tax is withheld.
b. The individual is treated as an employee by the firm with respect to fringe benefits offered to employees by the firm.
c. The individual usually works defined hours.
d. The employer requires that the individual must perform the work personally and cannot change drivers.
e. The individual has no choice in the acceptance or rejection of a load.
f. The individual and firm have no written contract; or, if there is a written contract, it does not specify the individual's relationship with the firm as being that of an independent contractor.

States such as Oklahoma, Iowa, and Georgia, specifically deal with owner-operators in the statute itself. Oklahoma's statutory provision, for example, reads:[34]

34. 85 OKLA. STAT. ANN. Tit. 85, § 3(4) (1989 Supp.). The emphasized provision is directed to "lease-purchase" plans which many carriers have initiated. *See* Hardman, *Administrative Bulls in the Delicate China Shop of Motor Carrier Operations,* 18 TRANSP. L.J. 115, 122-125

> Employee shall not include a person, commonly referred to as an owner-operator, who owns or leases a truck-tractor or truck for hire, if the owner-operator actively operates the truck-tractor or truck and *if the person contracting with the owner-operator is not the lessor of the truck-tractor or truck.* [Emphasis added]

In 1986, Iowa also enacted a statutory provision which specifically addressed owner-operators and exempted them from workers' compensation coverage.[35] The statute sets forth six specific conditions which must be "substantially present" if an individual is to be considered an owner-operator:[36] (1) the person must be responsible for the maintenance of equipment; (2) he or she must be principally responsible for the vehicle's operating cost; (3) he or she must supply the necessary driver personnel; (4) compensation must be based on factors related to work performed and not on the basis of hours or time expended; (5) the person must have the ability to determine the details and means of performing the service;[37] and (6) a contract must be entered specifying the relationship to be that of an independent contractor.

Georgia, in its 1991 legislative session, amended its statute[38] to spe-

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(1989). While the Oklahoma legislature, by the above provision, indicates a lease purchase plan *per se* creates an employment situation, this position was rejected by the Court in *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596 (D.C. Cir. 1989). While the labor agency gave great weight to the lease purchase plan in finding personnel to be employees, the court said that while such programs had the potential to lead to "control", the facts in the case did not lead to this conclusion nor support an inference of control. 869 F.2d at 604.

35. Iowa Code Ann. § 85.61(3)(c)(1)-(6)(1989 Supp.). The statute also excluded "independent contractor" from coverage, Iowa Code Ann. § 85.61(3)(b)(1989 Supp.). The trucking industry in Iowa sought the statutory amendment to allow owner-operators to cover themselves under the law. Independent contractors were prohibited by Iowa law from electing workers compensation coverage. One of the criteria of the new definition was that the contract "required the owner-operator to provide and maintain a certificate of workers' compensation with the carrier," Section 85.61 (3)(C)(6). After passage, carriers became concerned that the foregoing clause mandated coverage. The Iowa Motor Truck Association petitioned the Iowa Industrial Commissioner for a Declaratory Ruling. *In the Matter of the Interpretation of Senate File 2104*, an unpublished decision dated August 1, 1986, the Industrial Commissioner, Robert C. Landis, ruled it was not necessary for the owner-operator to carry workers' compensation insurance to be considered an independent contractor, but that the owner-operator could elect such coverage. The owner-operator merely has to provide a certificate of insurance if coverage is elected or a signed written certificate that he or she opts not to purchase such insurance.

36. The statute provision also specifically states that the owner-operator is an individual or partner who "owns" a vehicle licensed and registered as a truck, road tractor, or truck tractor by a government agency. There does not appear to be any printed decisions which has determined if a vehicle under a *bona fide* lease would be considered as owned for purposes of the statute.

37. The statute recognizes that this requirement can be qualified because of the necessity to conform to regulatory requirements, operational procedures of the carrier, and specifications of the shipper.

38. H.B. No. 773 (1991) amending Section 34-9-1 of the Official Code of Georgia Annotated. The applicable part reads: "For purposes of this chapter [workers' compensation], an owner-operator . . . shall be deemed to be an independent contractor."

cifically exempt an owner-operator defined as "an equipment lessor who leases his vehicular equipment with driver to a carrier."[39]

While the approach of states such as Oklahoma, Iowa, and Georgia is clearly advantageous to motor carriers, other statutes or interpretations of statutes by the courts can and agencies have caused carriers considerable problems.

THE STATUTORY EMPLOYEE

The concept of being a "statutory employee" was one which the industry grappled with in Wisconsin. Wisconsin had a statute in which the term "employee" included:[40]

> Every independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public provided he is not himself an employer subject to the Chapter . . . shall for the purpose of [workers' compensation] be an employee of an employer . . . for whom he is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

In *Employers Mutual Liability Insurance Company v. Department of Industry, Labor & Human Relations*,[41] the court found an owner-operator injured while maintaining his tractor to be a statutory employee because the evidence revealed the owner-operator had not driven for any other carrier or person for at least six years. This fact satisfied the requirement that he did not maintain a separate business. This same evidence, coupled with the absence of any evidence that the injured person held himself out to render service to the public, was used to establish that he did not hold himself out to the public.

Similar problems arose on the administrative level as the agency was on record as adopting the position that an owner-operator who was dependent on the operating authority of the carrier in the conduct of operation could not be deemed an independent contractor as he could not maintain a separate business or have full authority to conduct the business.

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39. GA. CODE ANN. § 10-2-87 (Michie 1991).

40. WIS. STAT. ANN. § 102.07(8) (1988). The term "statutory employee" is also used in respect to the "carry over" liability of the subcontractor to its employee to the prime contractor if the subcontractor fails to provide workers' compensation coverage to the employee. *See* Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla.App. 1989). This carryover is a generally accepted concept in the industry although motor carriers have had difficulty in policing subcontractor coverage. In Minnesota, if an insurance company and/or an agent issued the carrier a certification that such coverage exists and it does not and/or it is ceased thereafter in mid-term without notice to the carrier, the carrier is not held liable. The injured person receives coverage through the special compensation fund of the state. M.S.A. § 176.185 Subd. 1 (c) (1990).

41. 52 Wis.2d 515, 190 N.W.2d 907 (1971).

The basic guidelines that the agency followed were:[42]

CRITERIA	INDICATORS
Maintaining a Separate Business	Individual has a business permit.
—	There is a company incorporation.
—	Entity is registered with Secretary of State.
—	There is a discernible place of business.
—	Tax filings are for a business.
—	Equipment is fully owned by the individual and under his/her control with full authority to conduct the business.
Holds Self Out to the Public	Advertising.
—	Phone listing for business.
—	Ability to be found by the public (discernible place of business as above).
Renders Service to the Public	Does work for a number of persons as shown by testimony or documents.

In 1987, the state trucking association began an effort to resolve the problem created by Section 102.07(8). By 1989, a new statutory provision was enacted which provided that an independent contractor was not an employee if the contractor met all of the following nine conditions:[43]

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

The statutory amendment also provided that the agency "may not admit in evidence state or federal laws, regulations, documents granting

42. Letter of Carol A. Lobes, Administrator, Workers Compensation Division of the Department of Industry, Labor and Human Relations, to Mr. Thomas A. Howells, President of the Wisconsin Motor Carriers Association (April 23, 1986).

43. WIS. STAT. ANN. § 102.07(8)(b) (1991).

operating authority or licenses when determining whether an independent contractor meets the conditions . . ." in 1 or 3.[44]

The intent of the above provisions was to exclude from consideration control and direction resulting from governmental dictates. However, the wording appears to have the opposite effect. If a carrier requires a contractor to utilize certain routes because of the size or weight of the equipment and applicable state or federal traffic laws, it presumably could not introduce evidence of such laws to excuse the direction given to the contractor.

The amended statute also reflects another possible problem. It was designed to eliminate the need to show that a separate business was maintained, a provision necessitated by the old Section 102.07(8). However, the drafters for some unexplainable reason utilize the same wording in the amendment, although expanding upon it.

The end result, however, is that carriers are still faced with the issue of what constitutes a separate business. As previously noted in *Employers Mutual Life Insurance Co.*,[45] the owner-operator was found not to maintain a separate business because the evidence revealed he did not work under lease for multiple carriers during a six year period.

The addition of the words "his or her own office, equipment, materials and other facilities" does not seem to address or solve the above issue, *i.e.* did he serve others. If anything, it creates other problems as it emphasizes a need for an office and other items. Typically an owner-operator's office is his tractor or his "kitchen table" and he does not maintain "other facilities." Repairs to the tractor, etc., are done at public garages.

The explanation given by a special task force to study the legislation to the Workers' Compensation Advisory Council in Wisconsin, in part, states:[46]

> The requirement is designed to determine whether the individual makes a significant investment or incurs a significant obligation related to facilities (equipment of premises) or tools or materials used in performing services for another and which are not typically furnished by an employee.

To date, litigation has not arisen to determine whether the 1989 amendments have solved the problems of the "statutory employee" issue in Wisconsin.

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44. WIS. STAT. ANN § 102.07(8)(c).

45. *See* note 42, *supra*.

46. Memorandum of Richard A. Westley, Esq., of Madison, Wisconsin, a task force member, dated January 30, 1990. The Council reviews all proposed legislation before introduction. One can only speculate why the criterion was not worded in terms of its intent.

Michigan has a statute similar to the prior Wisconsin statute[47] and, while other states do not have statutes exactly like Wisconsin's past "statutory employee" provision, they impose a similar test by administrative or judicial decision.

Apart from statute, the test is commonly referred to as "The Relative Nature of the Work Test."[48] States such as Missouri, Montana, New Jersey, and North Dakota will look to see if an owner-operator maintains a separate business and if he or she holds out service to the public.[49]

MAINTAINING A SEPARATE BUSINESS

In determining whether a separate business exists, it would appear that the salient factors should be whether there is an investment of a substantial sum of equipment or tools, whether the individual bears a risk of loss attributable to the operations, whether the business may serve multiple accounts, and whether the business engages employees, helpers, or other businesses in conducting operations.

The criterion which appears to arise more frequently in a workers' compensation context is whether the owner-operator is serving multiple accounts.[50]

The nature of the motor carrier industry makes it difficult for owner-operators to serve more than one account. Until recently, the ICC Regulations required an owner-operator and motor carrier to enter into a long term lease giving the carrier exclusive use of the equipment. "Trip leasing"[51] could only occur between carriers holding authority from the ICC.[52] While independent contractors may now lease for one load, they still cannot be leased to more than one carrier at any one time.[53] Thus, to "trip lease," an independent contractor would have to cancel its contract with one carrier and execute a contract with the new carrier. This creates an administrative nightmare and not a realistic opportunity from a business standpoint.

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47. MICH. COM. LAWS ANN. § 418.161(1)(d) (1988). *See* White v. Central Transport, Inc., 150 Mich. App. 128, 388 N.W.2d 274 (1986).

48. *See, e.g.*, Cooper, *The Owner-Operator: An Independent Contractor or Employee?*, 36 Illinois Truck News 29 (1991).

49. *See* note 32, *supra*.

50. *See also* Employers Mut. L. Ins. Co., at note 41, *supra*.

51. Trip leasing is a procedure where a motor carrier with operating authority from the ICC would sublease equipment and operator or that equipment to another similarly authorized motor carrier to haul a single load or make a "trip."

52. See Boot, *The Motor Carrier Leasing Regulations of the Interstate Commerce Commission* (Washington D.C.: Common Carrier Conference - Irregular Route, Inc., 1961) p. 6-8.

53. See 49 C.F.R. § 1057.12(c)(1), *Elimination of Thirty Day Leasing Requirement ExParte, MC 43, (Sub 15)* 133 M.C.C. 392 (1984). An exception exists for household goods carriers. 49 C.F.R. § 1057.12(d)(3).

Foremost among the problems is that carriers and owner-operators frequently register the vehicle jointly with states so that fuel tax reporting and other types of reporting are simplified. This could not occur if the owner-operator jumped from carrier to carrier. Similarly, compliance with many of the Safety Rules of the Department of Transportation or a carrier's own safety or insurance requirements would be more difficult and costly. When a contractor contracts with a carrier, he or she is subject to drug testing, qualification tests, past experience investigations and other administrative matters.[54]

The real issue should not be whether the owner-operator may or can serve multiple accounts, but whether he or she may expand the business and use other equipment in the service of other carriers.

Because administrators of workers' compensation statutes seek broad coverage, a carrier may find it difficult to have the latter interpretation accepted.

HOLDING OUT TO THE PUBLIC

The requirement that the owner-operator hold itself out to the general public also creates problems in the motor carrier industry. Administrative agencies tend to equate this criterion to the normal business where the independent contractor has an office, a telephone listing, advertises, etc.[55]

It is difficult for them to think of a business where the demand for the provider is so great that advertising would be foolish.[56] Similarly, an office is not required when work is essentially performed in the vehicle and on the road. A telephone listing is senseless if the main portion of the business calls are exchanged while away from the contractor's home base.

In some instances, administrators, or courts will attempt to determine if there is integration, *i.e.*, the motor carrier is so dependent upon the services of the individual under contract that the individual is necessarily subject to control establishing "employment."[57]

In any business, however, two or more entities working on a common cause have an integration of interest. Each will accommodate the others interest if it means maximizing profits.

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54. *See generally*, Qualifications of Drivers, 49 C.F.R. Part 391.

55. *See* note 42, *supra*.

56. Carriers assign numerous employees and spend considerable money to recruit owner-operators. There are numerous publications which exist only to carry advertisements of carriers for independent contractor or driver employees. *See, e.g.*, PRO TRUCKER, a monthly magazine published by Ramp Enterprises, P.O. Box 549, Rosewell, GA 30077-0549.

57. *See* Morish V. United States, 555 F.2d 794 (Ct.Cl. 1977).

THE COMMON LAW AND FORUM SHOPPING

Apart from the above statutory and/or administrative situations, carriers also have difficulties with the courts' or agencies' interpretations of common law test in some states and frequently the common law differs on a state by state basis.

The industry is in many respects a unique one and thus traditional concepts of the "right to control," the "right to discharge," and other aspects of the common law tests are difficult to apply to motor carrier/owner-operator relationships.[58] Thus, motor carriers are always fearful of forum shopping.

A state normally will take jurisdiction of a claim based on such factors as where the contract was executed, where the injury occurred, where the injured individual resides, or where the business was localized.[59]

Thus, an injured individual frequently will file his or her claim in the state with one of the above contacts and with the best benefits. In the case of an owner-operator seeking workers' compensation coverage, the choice will frequently turn on the question of which of the states with possible jurisdiction has the most liberal definition of employment and/or favorable common law.

The issue of forum shopping might be overcome if the contract governing the relationship has a choice of law clause which has some reasonable relationship to the contracting parties' situation. This, however, is not assurance that an agency will apply the law of the state chosen. Most states will not recognize such contract clauses.[60]

Since motor carriage is frequently or essentially an interstate business, the problem of forum shopping is a serious one. Workers' compensation should be resolved under the law which the employer and employee anticipate irrespective of the fortuitous circumstances which often determine the forum.

ELECTIVE COVERAGE AS A POSSIBLE SOLUTIONS

Many carriers have attempted to avoid the coverage problems discussed by requiring owner-operators to elect coverage as a condition of

58. *See* Hardman, note 34, *supra*.

59. The case law regarding extra territorial operation and application of workers' compensation law is hopelessly confused. Prendergast v. Industrial Com. of Ohio, 136 Ohio St. 535, 27 N.E.2d 235 (1940). A state may apply its own law even though the statute of another state may also be applicable. Miller v. Yellow Cab Co., 308 Ill. App. 217, 31 N.E.2d 406 (1941). The factors which a court may consider are discussed in Toomer v. United Resin Adhesives, Inc., 652 F.Supp. 219 (N.D.Ill. 1986).

60. *See* Larson, note 8, *supra*, at § 87.71

the carrier contracting with them. Most states allow "sole proprietors" to elect coverage.[61]

While this may resolve the workers' compensation problem, it may create problems in other areas of the law and business. Many owner-operators do not desire coverage or feel they cannot afford it and they will not contract with carriers with such requirements. In a period where owner-operators are in short supply, it is difficult to adopt policies which hinder recruitment.

More significantly, however, is the requirement may trigger a finding that the owner-operator is an employee for other purposes.

The federal Internal Revenue Service in its "twenty questions" test to determine an individual's classification for employment tax purposes specifically covers inquiries whether the owner-operator is covered by workers' compensation.[62] While the coverage may be initiated only by the election of the individual, the provisions requiring such election as a condition of contract may be construed adversely to the carrier claiming the owner-operator is not an employee.

LEGISLATIVE AND/OR ADMINISTRATIVE SOLUTIONS

Initially, an amendment to the ICC Regulations could possibly solve some of the problems motor carriers face in the classification problem.

A paragraph could be added to the ICC Regulations clarifying that the control and responsibility provisions do not and were not intended to infer or result in the creation of an employer-employee relationship between lessor and lessee.[63]

This could be easily accomplished by adding a subparagraph to 49 C.F.R. § 1057.12(c) reading:

> (4) The provisions required by paragraph (c)(1) of this section are not intended to create an employer-employee relationship between the authorized carrier lessee and lessor or driver furnished by the lessor. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C § 11107 and administrative requirements.

The agency should be willing to accept this amendment because it is consistent with the history of the Regulations and their intent.

While this type of provision should help persuade some administrative agencies and courts to ignore the administrative "control and respon-

61. *See* 1991 Analysis, note 1, *supra*.

62. *See* Hardman, note 34, *supra*, at 127-28.

63. The administrative rules governing the lease of motor carrier equipment from owner-operators in Minnesota, for example, specifically states: "the lease may include the services of a driver and nothing in this chapter shall be construed to require that such a driver be an employee of the motor carrier lessee." Minn. R. § 7800.2500 (1989).

sibility" provisions in their determination of the classification issue, other problems such as forum shopping could and would continue.

While the concept of a federal workers compensation statute might in theory be attractive, it does not appear to be a politically viable solution particularly in light of the massive undertaking which would be involved in a political atmosphere which is essentially stated rights and *laissez-faire* orientated. Further, there is a fear among industry observers and insurers that if a federal act were to be enacted it would likely incorporate the costliest, most comprehensive features of state programs[64].

A modified approach, however, might be feasible and it could solve many of the industry's problems. A federal statute could be enacted which would:

1. Mandate workers compensation coverage of all employees.
2. Define the term "employment" and "exceptions" to coverage.
3. Utilize the existing state systems.[65]
4. Mandate the particular state law to be applied.[66]

The proposal gives the industry the standardization it seeks; does not create a new bureaucracy as existing state systems will be utilized; affords protection and clarity to employers and employees; and, achieves the underlying goals of the workers' compensation system.

CONCLUSIONS

The *Motor Carrier Employers' Liability Act*[67] is a step towards sensible uniformity. While it does not resolve many differences which exist between states as to procedures, types and extent of benefits, the proposed statute does resolve some of the major problems facing motor carriers and also allows them to know with some clarity which workers' compen-

64. Wicker and Williams, *The Workers' Compensation System; A Primer For the Trucking Industry* (W.D.C.: ATA and RCCC 1988) at 304.

65. The use of state workers' compensation laws to cover a federal right is not a new concept. In providing for "black lung" benefits for miners, 30 U.S.C. § 931 (1988) provides for filing under such laws.

66. Mandating the particular state law to be applied affords a basis for motor carriers and insurers to resolve premium guideline problems. A leading insurance attorney claims that more truckers are purchasing their workers' compensation insurance in low rate states instead of their "home" state and, in an attempt to fool the system, are renting post office boxes or store fronts in low-rates states and using the address to represent their permanent business location. Campbell, *Risky Practices in Workers' Comp. Could Lead to Loss of Coverage,* an unpublished article distributed in September, 1989, by Transport Insurance Company to industry members. The National Counsel on Compensation Insurance (NCCI) published guidelines as to where such insurance should be purchased, but the guidelines are not a paragon of clarity and one of the difficulties the motor carrier industry has had is applying them to truckload as well as less than truckload carriers. Letter of J.W. Morten, Risk Manager of Crete Carrier Corporation, a major truckload carrier to Kris. H. Ikejiri, General Counsel of the Interstate Truckload Carrier Conference of the American Trucking Associations, Inc., dated September 18, 1989.

67. *See* Addendum 1.

sation provisions will govern their operations and to take steps to meet such risks through insurance or otherwise. They will be faced with two statutes in lieu of the many which now govern multi-state operations.

ADDENDUM 1

MOTOR CARRIER EMPLOYERS' LIABILITY ACT

Chapter - Liability For Injuries to Employees

§ • Liability of carrier by motor vehicle, in interstate or foreign commerce, for injuries to employees.

Every carrier by motor vehicle within the jurisdiction of Title 49, United States Code, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between The District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable to its employees for compensation in every case of personal injury or death of an employee arising out and in the course of employment without regard to the question of negligence, unless the injury or death was intentionally self-inflicted or when the intoxication of the employee is the proximate cause of injury or death.

§ • Applicability of state law.

The liability of a carrier subject to the provisions of this chapter shall be determined under the compensation law of the state in which it has its principal place of business (except to the extent inconsistent with the provisions of this chapter) and such law shall be recognized and enforced by any and all state agencies and courts which assume jurisdiction of causes of action under this chapter.

§ • Employees defined.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

A person shall be considered an independent contractor and not an employee if each of the following factors are substantially present:

a. The independent contractor makes a significant investment or incurs a significant obligation related to facilities (equipment or premises) or tools or materials used in performing services which are not typically furnished an employee.
b. The independent contractor generally determines the means of performing service subject only to conformance with any regulatory requirements or those arising from any third party requirements.
c. The independent contractor has the principal burden of any operating and personal costs related to contract work.
d. The independent contractor's compensation is based on factors related

to the work performed and may realize a profit or suffer a loss based on the relationship of business receipts and expenditures.

e. A written contract governs the relationship and specifies the relationship of the parties to be that of independent contractor and not an employer-employee relationship.

§ • Election of coverage.

To the extent the compensation act of the state having jurisdiction pursuant to Section — of this Chapter allows corporate officers, corporate directors, sole proprietors, and partners of partnership to elect coverage, such an election may be made under this Chapter.

§ • Exclusive nature of remedy.

This chapter is exclusive and not cumulative.

§ • Non-impairment of duties, liabilities, or rights.

Nothing in this chapter shall be held to limit the duties or liabilities of carriers or to impair the rights of their employees under any other Act or Acts of Congress.